CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 32 FEBRUARY 11, 1998 NO. 6

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Parts 10, 18 and 114

(T.D. 98–10)

RIN 1515–AC03

BILATERAL CARNET AGREEMENT BETWEEN THE AMERICAN INSTITUTE IN TAIWAN AND THE TAIPEI ECONOMIC AND CULTURAL REPRESENTATIVE OFFICE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations which apply to carnets to reflect a bilateral agreement between the Taipei Economic and Cultural Representative in the United States (TECRO) and the American Institute in Taiwan (AIT). This agreement established a TECRO/AIT Carnet for the temporary admission of goods, commercial samples and professional equipment.

EFFECTIVE DATE: February 27, 1998.

FOR FURTHER INFORMATION CONTACT: Sharon Goodson or Dennis Sequeira, International Organizations and Agreements Division, U.S. Customs, 202–927–0971.

SUPPLEMENTARY INFORMATION:

BACKGROUND

A carnet is an international customs document, backed by an internationally valid guarantee, which may be used for the entry of articles under various customs procedures such as temporary importation and transportation in bond. The carnet is used in place of the usual national customs documentation and guarantees the payment of duties (including taxes and associated penalties) which may become due if the carnet requirements are not satisfied. The existence of a single document rather than numerous national documents facilitates international commerce.

The carnet guarantee is based on chains of national guaranteeing associations established in the countries accepting the carnets. The guar-

anteeing association is jointly and severally liable with the carnet holder for payment of the sums due in the event of noncompliance with the conditions or the procedures for which the carnet is used.

Benefits of the TECRO/AIT Carnet

In recent years, trade between the United States and Taiwan has increased. It is expected that this trend will continue, and that such trade can be facilitated through the use of carnets. However, Taiwan is currently ineligible to accede to the A.T.A. (Admission Temporaire—Temporary Admission) Carnet Convention, under which carnets facilitate trade among more than fifty contracting parties. Thus, Taiwan has sought access to the carnet facility through the recently concluded bilateral agreement between the Taipei Economic and Cultural Representative in the United States (TECRO) and the American Institute in Taiwan (AIT). This agreement established a TECRO/AIT Carnet for the temporary admission of goods, commercial samples and professional equipment. This agreement was negotiated pursuant to the authority contained in 22 U.S.C. 3305.

On November 4, 1996, Customs published a Notice of Proposed Rulemaking in the Federal Register (61 FR 56645) which proposed amending the Customs Regulations to reflect the TECRO/AIT Carnet and solicited comments on the proposal. No comments were received in response to the publication. After further consideration, Customs has determined to proceed to amend the regulations as proposed.

A Notice informing the public of the decision of the Commissioner of Customs regarding the selection of an issuing and guaranteeing association for the TECRO/AIT carnet will be made in a separate publication in the Federal Register.

Regulatory Flexibility Act

Insofar as the amendment is intended to facilitate international trade and remove some existing impediments to the conduct of business, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)*, it is certified that the amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Executive Order 12866

The amendment does not meet the criteria for a "significant regulatory action" under E.O. 12866.

Drafting Information

The principal author of this document was Peter T. Lynch, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 10

Customs duties and inspection, Exports, Reporting and recordkeeping requirements.

19 CFR Part 18

Customs duties and inspection, Common carriers, Surety bonds, Exports.

19 CFR Part 114

Customs duties and inspection, Exports, Trade agreements.

AMENDMENTS TO THE REGULATIONS

Parts 10, 18 and 114 of the Customs Regulations (19 CFR parts 10, 18 and 114) are amended as set forth below:

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for Part 10 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314.

* * * * * * *

2. Section 10.31 is amended by adding in paragraphs (a)(1) and (a)(2) the phrase "or a TECRO/AIT carnet" immediately after the words "A.T.A. carnet".

3. Section 10.39(d)(2) is amended by adding the words "or Agreement" immediately after the phrase "in the Convention".

PART 18—TRANSPORTATION IN BOND AND MERCHANDISE IN TRANSIT

1. The general authority citation for Part 18 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1551, 1552, 1553, 1624.

* * * * * * *

2. Section 18.1(a)(3) is amended by adding the phrase "or TECRO/AIT" immediately after the abbreviation "A.T.A." each time it appears.

3. Section 18.8(e)(3) is amended by adding the phrase "or TECRO/AIT" immediately after the abbreviation "A.T.A." each time it appears.

PART 114—CARNETS

1. The authority citation for Part 114 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624.

2. In § 114.1, paragraphs (b) and (c) are amended by adding the phrase "or bilateral Agreement" immediately after the words "Cus-

toms Convention" each time they appear, and a new paragraph (g) is added to read as follows:

§ 114.1 Definitions.

* * * * * * *

(g) *TECRO/AIT Carnet.* "TECRO/AIT carnet" means the document issued pursuant to the Bilateral Agreement between the Taipei Economic and Cultural Representative Office (TECRO) and the American Institute in Taiwan (AIT) to cover the temporary admission of goods.

3. Section 114.2 is amended by revising the section heading and the introductory paragraph and by adding a new paragraph (d) to read as follows:

§ 114.2 Customs Conventions and Agreements.

The regulations in this part relate to carnets provided for in the following Customs Conventions and Agreements:

* * * * * * *

(d) Agreement Between the Taipei Economic and Cultural Representative Office in the United States and the American Institute in Taiwan on TECRO/AIT Carnet for the Temporary Admission of Goods (hereinafter referred to as the Agreement).

4. In § 114.3, the introductory text in paragraph (a) and paragraph (a)(2) are amended by adding the words "or Agreement" immediately after the word "Convention" each time it appears.

5. Section 114.11 is amended by adding the words "or Agreement" immediately after the word "Convention" each time it appears.

6. Section 114.22 is amended by redesignating paragraph (d) as paragraph (e) and adding a new paragraph (d) to read as follows:

§ 114.22 Coverage of carnets.

* * * * * * *

(d) *TECRO/AIT carnet.*—(1) *Use.* The TECRO/AIT carnet is acceptable for the following two categories of goods to be temporarily imported, unless importation is prohibited under the laws and regulations of the United States:

(i) Professional equipment; and

(ii) Commercial samples and advertising material imported for the purpose of being shown or demonstrated with a view to soliciting orders.

(2) *Issue and use.* (i) Issuing associations shall indicate on the cover of the TECRO/AIT carnet the customs territory in which it is valid and the name and address of the guaranteeing association.

(ii) The period fixed for re-exportation of goods imported under cover of a TECRO/AIT carnet shall not in any case exceed the period of validity of that carnet.

* * * * * * *

7. Section 114.23 is amended by adding a new paragraph (c) to read as follows:

§ 114.23 Maximum period.

* * * * * * *

(c) *TECRO/AIT carnet.* A TECRO/AIT carnet shall not be issued with a period of validity exceeding one year from the date of issue. This period of validity cannot be extended and must be shown on the front cover of the carnet.

8. Section 114.24 is amended by adding the phrase "or TECRO/AIT" immediately after the abbreviation "A.T.A.".

9. Section 114.25 is amended by adding the phrase "or TECRO/AIT" immediately after the abbreviation "A.T.A.".

10. In § 114.26, paragraphs (a) and (b) are amended by adding the phrase "or TECRO/AIT" immediately after the abbreviation "A.T.A." each time it appears.

11. Section 114.31 (b) is amended by adding the phrase "or TECRO/AIT" immediately after the abbreviation "A.T.A.".

12. Section 114.32 is amended by adding the phrase "or TECRO/AIT" immediately after the abbreviation "A.T.A." the first time it appears and by adding the phrase "or TECRO/AIT Agreement" immediately after the phrase "A.T.A. Convention".

13. Section 114.33 is amended by adding the words "or Agreement" immediately after the word "Convention".

14. Section 114.34 is amended by adding, in the heading and text of paragraph (b), the phrase "or TECRO/AIT" immediately after the abbreviation "A.T.A." each time it appears.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: August 22, 1997.
DENNIS M. O'CONNELL,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, January 28, 1998 (63 FR 4167)]

U.S. Customs Service

General Notices

TECRO/AIT CARNET ISSUING AND GUARANTEEING ASSOCIATION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice informs the public that Customs has selected the United States Council for International Business as the organization which will issue and guarantee TECRO/AIT carnets. These carnets are being issued pursuant to the TECRO/AIT Carnet Agreement which has been entered into between the Taipei Economic and Cultural Representative in the United States (TECRO) and the American Institute in Taiwan (AIT) for the temporary admission of goods, commercial samples and professional equipment.

FOR FURTHER INFORMATION CONTACT: William Scopa, Office of Field Operations 202–927–3112.

SUPPLEMENTARY INFORMATION:

BACKGROUND

This notice advises the public that the United States Council for International Business has been selected as the issuing and guaranteeing organization for a new carnet, known as the "TECRO/AIT Carnet". This carnet is being offered as a result of the signing of a bilateral carnet agreement between the Taipei Economic and Cultural Representative in the United States (TECRO) and the American Institute in Taiwan (AIT) for the temporary admission of goods, commercial samples and professional equipment. In a final rule also published in this issue of the Federal Register, Customs is amending its regulations which apply to carnets to reflect this new agreement.

A carnet is an international customs document, backed by an internationally valid guarantee, which may be used for the temporary admission of merchandise. The carnet is used in place of the usual national customs documentation and guarantees the payment of duties (including taxes) which may become due if the requirements of the carnet are not satisfied.

Taiwan is currently ineligible to accede to the ATA Carnet Convention, under which carnets facilitate trade among more than fifty con-

tracting parties. Thus, Taiwan has sought access to the carnet facility through the recently concluded TECRO/AIT Carnet Agreement. This agreement was negotiated pursuant to the authority contained in 22 U.S.C. 3305.

On November 4, 1996, a Notice was published in the Federal Register (61 FR 56740) in which the Customs Service informed the public of the TECRO/AIT carnet and solicited applications for an organization to issue and guarantee the new carnet.

The issuing association must be approved by the Commissioner of Customs. The guaranteeing association is jointly and severally liable with the carnet holder for the payment of the sums. The guaranteeing association also must be approved by the Commissioner of Customs.

Pursuant to § 114.11, Customs Regulations (19 CFR 114.11), an association, in order to be approved by Customs, must provide in writing that it will undertake to perform the functions and fulfill the obligations specified in the Agreement to which the United States accedes.

Based upon the information received from the United States Council for International Business, the Commissioner of Customs has determined that the United States Council for International Business satisfies the conditions to be designated an issuing and guaranteeing organization for the TECRO/AIT Carnet.

Dated: July 15, 1997.

GEORGE J. WEISE,
Commissioner of Customs.

[Published in the Federal Register, January 28, 1998 (63 FR 4344)]

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING PC CARDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of final determination,

SUMMARY: This document provides notice that Customs has issued a final determination concerning the country of origin of certain PC cards which are being offered for sale to the U.S. Government. The final determination found that based upon the facts presented, the country of origin of the PC cards which are produced in Mexico from U.S. and foreign components is Mexico.

DATES: The final determination was issued on January 9, 1998. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of the final determination within 30 days of January 29, 1998. A copy of the final determination will be published in the CUSTOMS BULLETIN.

FOR FURTHER INFORMATION CONTACT: Burton L. Schlissel, Senior Attorney, Office of Regulations and Rulings, (202) 927–1034.

SUPPLEMENTARY INFORMATION:

Notice is hereby given that on January 9, 1998, pursuant to Subpart B of Part 177, Customs Regulations (19 CFR Part 177, Subpart B), Customs issued a final determination concerning the country of origin of certain PC cards which are being offered to the U.S. Government. The U.S. Customs ruling number is HQ 559815. This final determination was issued at the request of the offeror under procedures set forth in 19 CFR 177 subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). The final determination concluded that based upon the facts presented, printed circuit boards and other components imported into Mexico are substantially transformed as a consequence of the assembly operations performed in Mexico resulting in the completed PC cards. Accordingly, the country of origin of the PC cards is Mexico. This document gives notice pursuant to section 177.29, Customs Regulations (19 CFR 177.29), of that final determination. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within 30 days of January 29, 1998.

Dated: January 26, 1998.

JOHN DURANT,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, January 29, 1998 (63 FR 4522)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, January 28, 1998.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

WITHDRAWAL OF PROPOSED REVOCATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF PARAMETHOXY PHENYLACETIC ACID, ALPHA-HYDROXY ETHYL AMINO PENTANE-DIOIC ACID METHYL ESTER AND METHOXY MORPHINAN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of withdrawal of proposed revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), on November 19, 1997, Customs published a notice advising interested parties of its proposal to revoke rulings pertaining to the tariff classification of para-methoxy phenylacetic acid (proposed HQ 958617), alpha-hydroxy ethyl amino pentanedioic acid methylester (proposed HQ 958618), and methoxy morphinan (proposed HQ 958619). However, further research has revealed that Customs previous position on the tariff classification of the compounds considered in proposed HQ 958617 and HQ 958618 was correct. In proposed HQ 958619, Customs proposed to revoke NY 889472. Customs maintains that NY 889472 is incorrect; however methoxy morphinan is not properly classified in subheading 2933.40.26, HTSUS, the subheading put forth in proposed HQ 958619. Customs intends to revisit this issue at a later date.

Therefore, Customs hereby notifies interested parties of its intention to withdraw proposed rulings HQ 958617, HQ 958618, and HQ 958619.

FOR FURTHER INFORMATION CONTACT: Richard Romero, Attorney-Advisor, General Classification Branch at 202–927–2388.

Dated: January 27, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF EYEGLASS REPAIR KIT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter relating to the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) of an eyeglass repair kit. The kit contains a small hand magnifier, six steel eyeglass repair screws and a screwdriver, to which a metal key chain is attached. Customs invites comments on the correctness of the proposed modification.

DATE: Comments must be received on or before March 13, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927–0760. .

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter relating to the tariff classification of an eyeglass repair kit. Customs invites comments on the correctness of the proposed modification.

NY 880021, dated November 19, 1992, in part, addressed the tariff status of the Deluxe Repair Kit, style 170, which contained a small hand magnifier, six steel eyeglass repair screws, and a screwdriver to which a metal key chain is attached. Customs concluded that the kit did not qualify as goods put up in sets for retail sale ("set") under General Interpretative Rule (GRI) 3(b), HTSUS, because while the screwdriver and screws served the specific function of repairing eyeglasses, the hand magnifier was a general-purpose article suitable for use any time a small hand magnifier was needed. The screwdriver, screws and hand magnifier were held to be separately classifiable *eo nomine*, by name, in subheadings 8205.40.00, 7318.15.60 and 9013.80.20, HTSUS, respectively. *NY* 880021 is set forth as "Attachment A" to this document.

It is now Customs position that the Deluxe Repair Kit, style 170, does, in fact, constitute a set for tariff purposes. The hand magnifier contributes to the specific activity of eyeglass repair in that it increases visual acuity as one inserts the tiny repair screws into the temple bars of the glasses. We conclude that the screwdriver imparts the essential character to the kit because it is the tool which completes the actual repair. Accordingly, we propose to classify the Deluxe Repair Kit in subheading 8205.40.00, HTSUS, a provision for screwdrivers, and parts thereof. *HQ* 960228 modifying *NY* 880021 is set forth as "Attachment B" to this document.

Before taking this action, we will give consideration to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: December 24, 1997.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, November 19, 1992.

CLA-2-90:S:N:N1:114 880021
Category: Classification
Tariff Nos. 9013.80.2000,
8205.40.0000 and 7318.15.6000

MR. JIM REYNOLDS
JOHN A. STEER CO.
28 S. 2nd Street
Philadelphia, PA 19106

Re: The tariff classification of eyeglass repair kits from Hong Kong.

DEAR MR. REYNOLDS:

In your letter dated October 28, 1992, on behalf of L. Lawrence Products, Inc., you requested a tariff classification ruling.

The deluxe repair kit, style 170, contains a hand magnifier, a screwdriver and six steel eyeglass repair screws. The regular repair kit, style 179, contains a screwdriver and six steel eyeglass repair screws.

The deluxe repair kit, style 170, is not considered a set for tariff classification purposes because the articles in the kit serve two functions. The hand magnifier is a general purpose magnifier suited for use anytime a small hand magnifier is needed. The screwdriver and screws are used to repair eyeglasses.

The applicable subheading for the magnifier contained in the deluxe repair kit, style 170, will be 9013.80.2000, Harmonized Tariff Schedule of the United States (HTS), which provides for hand magnifiers, magnifying glasses, loupes, thread counters and similar apparatus. The rate of duty will be 6.6 percent *ad valorem*.

The applicable subheading for the screwdriver contained in the deluxe repair kit, style 170, will be 8205.40.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for screwdrivers, and parts thereof. The rate of duty will be 6.2 percent *ad valorem*.

The applicable subheading for the steel eyeglass repair screws contained in the deluxe repair kit, style 170, will be 7318.15.6000, Harmonized Tariff Schedule of the United States (HTS), which provides for other screws, having shanks or threads with a diameter of less than 6 mm. The rate of duty will be 6.2 percent *ad valorem*.

Style No. 179, containing a screwdriver and screws, is considered a set for tariff classification purposes. The screwdriver and the screws are used for one purpose, to repair eyeglass frames. The essential character of the set is imparted by the screwdriver. Accordingly, the applicable subheading for the regular repair kit, style 179, will be 8205,40.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for screwdrivers, and parts thereof. The rate of duty will be 6.2 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy or this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 960228 JAS
Category: Classification
Tariff No. 8205.40.00

MR. JIM REYNOLDS
JOHN A. STEER CO.
28 S. 2nd. St.
Philadelphia, PA 19106

Re: *NY* 880021 Modified; eyeglass repair kit, combined hand magnifier, screwdriver, steel screws, and key chain; goods put up in sets for retail sale, essential character, GRI 3(b); *NY* A86533.

DEAR MR. REYNOLDS:

In *NY* 880021, issued to you on November 19, 1992, on behalf of L. Lawrence Products, Inc., the Area Director of Customs, New York Seaport, held that the Deluxe Repair Kit, style 170, was not a set for tariff classification purposes, and that the components were separately classifiable under the Harmonized Tariff Schedule of the United States (HTSUS). The ruling also held that the Keychain Repair Kit, style 179, was a set for tariff purposes. We have reconsidered this ruling and now believe that both styles are sets for tariff purposes.

Facts:

The Deluxe Repair Kit, style 170, is 3¾ inches long, of plastic. It consists of a hand magnifier, the handle of which is open on the end and hollow, and contains six (6) metal eyeglass repair screws. A screwdriver with metal key chain on one end is press fitted into the open end of the magnifier. In a letter, dated December 12, 1997, the importer submitted a sample, together with a brochure, and stated that the article is imported assembled but unpackaged. In most instances, the kits are blister packaged after importation for retail sale.

The provisions under consideration are as follows:

7318	Screws * * * and similar articles, of iron or steel:
7318.50	Other screws and bolts:
	Other:
7318.15.60	Having shanks or threads with a diameter of less than 6 mm * * * 6.2 percent *ad valorem*
* * * * * * *	
8205	Handtools * * * not elsewhere specified or included:
8205.40.00	Screwdrivers, and parts thereof * * * 6.2 percent *ad valorem*
* * * * * * *	
9013	[o]ther optical appliances and instruments, not specified or included elsewhere in [chapter 90] * * *:
9013.80	Other devices, appliances and instruments:
9013.80.20	Hand magnifiers * * * 6.6 percent *ad valorem*

Issue:

Whether the Deluxe Repair Kit is a Good Put Up in Sets for Retail Sale.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 3(b) states, in part, that goods put up in sets for retail sale ("sets") shall be classified as if consisting of the component which gives them their essential character.

The **Harmonized Commodity Description and Coding System Explanatory Notes** (**ENs**) constitute the official interpretation of the Harmonized System. While not

legally binding, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

To qualify as a set for tariff purposes, relevant ENs for GRI 3(b), at p. 5, list three requirements: (1) there must be at least two articles which are, *prima facie*, classifiable in different headings; (2) the components must be put up together to meet a particular need or carry out a specific activity; and, (3) the components must be put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

NY 880021 held that the Deluxe Repair Kit, style 170, was not a set for tariff purposes because the hand magnifier did not contribute to the specific activity of eyeglass repair. The components in style 170 were held to be separately classifiable. We are now of the opinion that this repair kit is, in fact, a set for tariff purposes. The individual components of the kit are, *prima facie*, classifiable in different headings of the HTSUS, as indicated above. Along with the screwdriver and screws, the hand magnifier contributes to the specific activity of eyeglass repair by increasing visual acuity for the purpose of inserting the tiny repair screws into the temple bars of the glasses. The key chain merely enhances the portable nature of the repair kit. The fact that in most instances the repair kit is blister packaged for retail sale after importation is not relevant in this case because, as imported, the good is assembled and, thus, put up in a manner *suitable* for sale directly to users without repacking. Because the screwdriver is the tool by which the actual repair is completed, we conclude that it imparts the essential character to the good. NY A86533, dated September 11, 1996, classified a nearly identical eyeglass repair kit similarly.

Holding:

Under the authority of GRI 3(b), the Deluxe Repair Kit, style 170, is provided for in heading 8205. It is classifiable in subheading 8205.40.00, HTSUS. *NY* 880021, dated November 19, 1992, is modified accordingly.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF EYELASH CURLERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of eyelash curlers under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

DATE: Comments must be received on or before March 13, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings,

Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, DC 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Arnold L. Sarasky, General Classification Branch, (202) 927–1009.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of eyelash curlers.

New York Ruling Letter (NYRL) 827204, issued January 21, 1988, by the Area Director, New York Seaport, held, as herein pertinent, that eyelash curlers, with or without rubber refills, were classified under subheading 8205.59.55, HTSUSA, which provides for other hand tools (including glass cutters) and parts thereof: other. A copy of the above ruling is set forth in Attachment A to this document.

Customs Headquarters, in Headquarters Ruling Letter (HRL) 955840, dated March 1, 1994, concluded that eyelash curlers were properly classified in subheading 9615.90.2000, HTSUSA, the provision for combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like. A copy of HRL 955840 is set forth in Attachment B to this document. Customs Headquarters is of the opinion that such classification is more nearly descriptive of the product than the subheading referenced in NYRL 827204. Accordingly, we propose to modify that portion of the NYRL 827204 insofar as it covers eyelash curlers.

Before taking this action, consideration will be given to any written comments timely received. The proposed ruling modifying NYRL 827204 is set forth in Attachment C to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: January 23, 1998.

JOHN T. ROTH,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, January 21, 1988.

CLA–2–04:S:COM:N1:240 827204
Category: Classification
Tariff No. 8205.59.55, 3304.10.0000,
3304.20.0000, and 8211.10.0000

MS. CAROL A. GARRITY
GARRETT-HEWITT INTERNATIONAL, INC.
901 No. Broadway, Suite 16
No. White Plains, NY 10603

Re: The tariff classification of eyelash curlers from Japan, cosmetic pencils from Italy and cosmetic pencil sharpeners from West Germany.

DEAR MS. GARRITY:

In your letter dated December 16, 1987, you requested a tariff classification ruling under the Harmonized Tariff Schedule of the United States (HTS), which is scheduled to replace the Tariff Schedules (TSUS) in 1988. Public notice of the exact date will be given.

The applicable HTS subheading for the eyelash curlers, style #25 with or without rubber refill, will be 8205.59.55, which provides for other handtools (including glass cutters) and parts thereof: other. The duty rate will be 5.3 percent *ad valorem*.

The applicable HTS subheading for the cosmetic lip pencil will be 3304.10.00, which provides for lip make-up preparations. The duty rate will be 4.9 percent *ad valorem*. The cosmetic eye definer pencil is classifiable in HTS subheading 3304.20.0000, which provides for eye make-up preparations. The rate of duty is 4.9 percent *ad valorem*.

The cosmetic pencil sharpeners, styles #810.0, #811.0, #825.0, are classifiable under HTS subheading 8214.10.0000, which provides for paper knives, letters openers, erasing knives, pencil sharpeners (nonmechanical) and blades and other parts thereof. The rate of duty will be 0.4 cents each and 6.1 percent *ad valorem*.

This classification represents the present position of the Customs Service regarding the dutiable status of the merchandise under the HTS. If there are changes before enactment this advice may not continue to be applicable.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

MAX G. WILLIS,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 1, 1994.

CLA–2 CO:R:C:F 955840 GGD
Category: Classification
Tariff No. 9615.90.2000 and 7009.92.1000

MS. ELEANOR HUANG WILSON
RELIABLE WORLD TRADE CO., LTD.
1711 East 14th Street
San Leandro, CA 94577

Re: Steel eyelash curlers; shaving mirror with aluminum frame.

DEAR MS. WILSON:

This letter is in response to your inquiry of November 15, 1993, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of articles to be imported from Taiwan, identified as eyelash curlers (small size) and a shaving mirror five inches in diameter. Only photographs of the eyelash curlers were submitted with your inquiry.

Facts:

The small eyelash curlers are further identified by item nos. CSI–3510–NP, CSI–4010–NP, CSI–4013–10, CSI–4015–GP, CSI–4015–02, and CSI–4015–05. When the scissor-like, curler handles are manually separated, a slide moves away from the top edge of the curler to allow for insertion of the eyelashes. When the handles are squeezed, the slide and edge merge on the eyelash and curl it. Synthetic rubber (silicone) pads, identified by item no. CS–3501, are included as parts of each curler for attachment to the metal slide. You stated telephonically that the shaving mirror has an aluminum frame.

Issues:

1) Whether the eyelash curlers should be classified in heading 8203, HTSUSA, as tweezers and similar handtools; or in heading 9615, HTSUSA, as hair-curlers and the like.

2) What is the classification of the aluminum framed shaving mirror?

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRIs.

Heading 8203, HTSUSA, provides for "Files, rasps, pliers (including cutting pliers), pincers, tweezers, metal cutting shears, pipecutters, bolt cutters, perforating punches and similar handtools, and base metal parts thereof." Chapter 82 falls within Section XV, HTSUSA. Note 1(m) to Section XV states that the section does not cover "* * * other articles of chapter 96 (miscellaneous manufactured articles)." The ENs to heading 8203 state that, among other handtools, the heading covers "Tweezers (e.g., watchmakers', florists', philatelists', depilating)." Although depilating tweezers are used to remove hair from the skin, they are the only hair-related handtool mentioned in the heading.

As noted above, Chapter 96 covers miscellaneous manufactured articles. The ENs suggest that the chapter covers certain toilet articles and other items not more specifically covered by other headings in the nomenclature. Heading 9615, HTSUSA, provides for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like * * * and parts thereof." In contrast to heading 8203, all of the items mentioned in this tariff provision relate to the hair, and several are used to curl the hair. Since the eyelash curlers are designed to curl hair, they are classifiable within heading 9615 and, by virtue of Note 1(m) to Section XV, not within heading 8203, HTSUSA. The eyelash curlers are classified in subheading 9615.90.2000, HTSUSA, the provision for nonthermic, nonornamental devices for curling the hair.

With respect to the aluminum-framed shaving mirror, heading 7009, HTSUSA, provides for "Glass mirrors, whether or not framed, including rear-view mirrors." The ENs to heading 7009 indicate that the heading covers toilet mirrors, including hand mirrors framed with metal. The shaving mirror is classified in subheading 7009.92.1000, HTSUSA, the provision for framed mirrors not over 929 square centimeters in reflecting area.

Holding:

The steel eyelash curlers (small size) and rubber pads, identified by item nos. CSI–3510–NP, CSI–4010–NP, CSI–4013–10, CSI–4015–GP, CSI–4015–02, CSI–4015–05, and CS–3501, are classified in subheading 9615.90.2000, HTSUSA, the provision for "Combs, hair-slides and the like; hairpins, curling pins, curling grips, hair-curlers and the like, other than those of heading 8516, and parts thereof: Other: Nonthermic, nonornamental devices for curling the hair." The applicable duty rate is 8.1 percent *ad valorem*.

The aluminum-framed shaving mirror (five inches in diameter) is classified in subheading 7009.92.1000, HTSUSA, the provision for "Glass mirrors, whether or not framed, including rear-view mirrors: Other: Framed: Not over 929 square centimeters in reflecting area." The applicable duty rate is 7.8 percent *ad valorem*.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 961076 ALS
Category: Classification
Tariff No. 9615.90.2000

MS. CAROL A. GARRITY
COORDINATOR
GARRETT HEWITT INTERNATIONAL
147 Broadway
Hawthorne, NY 10532

Re: New York Ruling Letter (NYRL) 827204, dated January 21, 1988, regarding eyelash curlers.

DEAR MS. GARRITY:

In NYRL 827204 you were advised that certain eyelash curlers were classifiable in subheading 8205.59.55, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), the provision for other hand tools (including glass cutters) and parts thereof: other. We note that ruling is in conflict with Headquarters Ruling Letter (HRL) 955840, dated March 1, 1994, which held that eyelash curlers were classifiable in subheading 9615.90.2000, HTSUSA, the provision for combs, hair-slides * * * and the like. This ruling modifies NYRL 827204 as to eyelash curlers so that it conforms to HRL 955840 which we have concluded correctly sets forth the classification of this article.

Facts:

The articles under consideration are eyelash curlers. They have scissor-like handles. When the handles are manually separated, a slide moves away from the top edge of the curler to allow for insertion of an eyelash. When the handles are squeezed, the slide and edge merge on the eyelash and curl it. Rubber pads are attached to the metal slide.

Issue:

What is the classification of eyelash curlers?

Law and Analysis:

Classification of merchandise under the HTSUSA is governed by the General Rules of Interpretation (GRI's) taken in order. GRI 1 provides that the classification is determined

first in accordance with the terms of the headings and any relative section and chapter notes. If GRI 1 fails to classify the goods and if the headings and legal notes do not otherwise require, the remaining GRI's are applied, taken in order.

NYRL 827204 held that the subject articles were classifiable under subheading 8205.59.55, HTSUSA, the provision for other hand tools (including glass cutters) and parts thereof: other. That subheading comes within section XV, chapter 82, HTSUSA. Note 1(m) to that section states that the section does not cover "* * * other articles of chapter 96 (miscellaneous manufactured articles)." The Explanatory Notes to the Harmonized System relative to heading 9615, which represents the view of the international classification experts, provides for curling pins, curling grips, hair-curlers and the like. In contrast to heading 8205, all of the items mentioned in that heading relate to the hair, and several are used to curl the hair. Since the eyelash curlers are designed to curl hair, they are considered like the exemplars noted the referenced EN. Accordingly, we have concluded that eyelash curlers should be classified in subheading 9615.90.2000, HTSUSA.

Holding:

Eyelash curlers of metal are classifiable in subheading 9615.90.2000, HTSUSA, the provision for combs, hair-slides and the like; hair pins, curling pins, curling grips, hair-curlers and the like. Merchandise so classifiable is subject to a general rate of duty of 8.1 percent *ad valorem* (1998).

NYRL 827204, dated January 21, 1988, is hereby modified as to eyelash curlers.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF CERTAIN ARTIFICIAL FOOD SWEETENER (ISOMALT)

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking New York Ruling Letter (NYRL) 849851, dated March 14, 1990, concerning the classification of an isomalt product in the formulation described in that ruling letter.

EFFECTIVE DATE: For merchandise entered or withdrawn from warehouse for consumption and covered by the revocation notice for NYRL 849851, the effective date is on or after April 13, 1998. For other merchandise described in the final ruling letter, there is no delay in the effective date for merchandise entered or withdrawn from warehouse for consumption.

FURTHER INFORMATION CONTACT: Norman W. King, General Classification Branch, Office of Regulations and Rulings (202) 927–1109.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 8, 1997, Customs published in the CUSTOMS BULLETIN, Volume 31, No. 41, a proposal to revoke NYRL 849851, dated March 14, 1990, which held that an isomalt product composed of 50 percent of sorbitol and 50 percent mannitol, was classified in subheading 3823.90.5050, Harmonized Tariff Schedule of the United States (HTSUS), as other chemical mixtures not elsewhere provided for.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NYRL 849851, dated March 14, 1990, to reflect the proper classification of the isomalt product described in NYRL 849851 in subheading 2105.90.9998, HTSUS, as other food preparations not elsewhere specified or included. Headquarters Ruling Letter (HRL) 960203 revoking NYRL 849851 is set forth in the attachment to this document.

The comment received as a result of the notice was submitted by counsel for the importer who obtained NYRL 849851. The submission contained specifications for another isomalt product which differs from the specifications contained in NYRL 849851. We have included in HRL 960203 a prospective ruling for this other isomalt product under section 177.1 of the Customs Regulations (19 CFR 177.10(c)(1)).

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), of the Customs Regulations (19 CFR 177.10(c)(1)).

Dated: January 23, 1998.

JOHN T. ROTH,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 23, 1998.
CLA-2 RR:CR:GC 960203K
Category: Classification
Tariff No. 2106.90.9998 and 2940.00.6000

MICHAEL K. TOMENGA, ESQ.
MCKENNA & CUNEO
ATTORNEYS AT LAW
1900 K Street, N.W.
Washington, DC 20006-1108

Re: Tariff classification of various isomalt products; revocation of New York Ruling Letter (NYRL) 849851, Dated March 14, 1990.

DEAR MR. TOMENGA:

In response to a letter dated February 16, 1990, from Schenker's International Forwarders, Inc., a Customs broker, on behalf of your client, Irwin Services, D.B.A. Palatinit, the Customs Service issued NYRL 849851, dated March 14, 1990, which held that an isomalt product formulated as described in the ruling letter, was classified in subheading 3823.90.5050, Harmonized Tariff Schedule of the United States (HTSUS) (1990), which provided for other chemical mixtures not elsewhere provided for. This provision has been redesignated as subheading 3824.90.90, HTSUS, with a 1998 general rate of duty of 5 percent *ad valorem*, and subject to special provisions in subheadings 9901.00.50 and 52, HTSUS (not applicable to the merchandise in question).

This letter is to inform you that NYRL 849851 no longer reflects the views of the Customs Service and is revoked in accordance with section 177.9(d) of the Customs Regulations (19 CFR 177.9(d)). Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NYRL 849851 was published on October 8, 1997, in the CUSTOMS BULLETIN, in Volume 31, No. 41. The following represents our current position with respect to the isomalt product described in NYRL 849851 and an isomalt product of a different formulation.

Facts:

The specific isomalt product from West Germany described in NYRL 849851, dated March 14, 1990, contained a mixture of 50 percent of sorbitol and 50 percent mannitol (used as an artificial food sweetener) and was classified in the applicable 1990 subheading 3823.90.5050, HTSUS, which provided for chemical mixtures not elsewhere provided for (1998 subheading 3824.90.90, HTSUS), with a general rate of duty at 5 percent *ad valorem*. In its notice of October 8, 1997, Customs proposed to revoke NYRL 849851, and classify the product in subheading 2106.90.9998, HTSUS, as other food preparations not elsewhere specified or included, with a general rate of duty for 1998, at 7.6 percent *ad valorem*.

As the result of the proposed notice, you submitted timely comments on behalf of your client, dated November 6, 1997, and claimed that the products generically known as "isomalt" are precluded from classification in subheading 3824.90.90, HTSUS, as chemical mixtures, not especially provided and are also precluded from subheading 2106.90.9998, HTSUS, as other food preparations not elsewhere specified or included. You proposed that isomalt products be classified as an other sugar ether, subheading 2940.00.6000, HTSUS, with a 1997 general rate of duty at 5.8 percent *ad valorem*. As you are aware, the specifications including the manufacturing process in your proposed classification as a sugar ether, differed from the information which formed the basis for the decision in NYRL 849851. We agree with your classification position for the product as described in your submission of November 6, 1997. The specifications and the reasoning for the classification of this product is further discussed under the caption "Law and Analysis". However, we adhere to our position to classify the isomalt product as described in NYRL 849851, as other food preparations not elsewhere specified or included, in subheading 2106.90.9998, HTSUS.

Issue:

The first issue is whether an isomalt product containing 50 percent of sorbitol and 50 percent of mannitol (used as an artificial food sweetener), as a mixture of chemicals with

foodstuffs or other substances with nutritive value, of a kind used in the preparation of human foodstuffs, is excluded from coverage in Chapter 38, HTSUS, by virtue of Legal Note 1(b) of Chapter 38, and, if it is, is the product classified as other food preparations not elsewhere specified or included, in subheading 2106.90.9998, HTSUS?

The second issue is whether other isomalt products may be classified in other provisions of the tariff depending on the specifications and manufacture?

Law and Analysis:

Legal Note 1(b) Chapter 38, HTSUS, states that Chapter 38 does not cover "mixtures of chemicals with foodstuffs or other substances with nutritive value, of a kind used in the preparation of human foodstuffs (generally, heading 2106)."

The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and General Rules of Interpretation of the HTSUS. In 1993, the General ENs to Chapter 38 were amended to clarify the term "foodstuffs or other substances with nutritive value", of Legal Note 1(b) as follows:

> For the purposes of Note 1 (b) to the Chapter, the expression "'foodstuffs or other substances with nutritive value" principally includes edible products of Sections I to IV.
>
> The expression "foodstuffs or other substances with nutritive value" also includes certain other products, for example, products of Chapter 28 used as mineral supplements in food preparations, sugar alcohols of heading 29.05, essential amino acids of heading 29.22, lecithin of heading 29.23, provitamins and vitamins of heading 29.36, sugars of heading 29.40, animal blood fractions of heading 30.02 for use in food preparations, casein and caseinates of heading 35.01, albumins of heading 35.02, edible gelatin of heading 35.03, edible protein substances of heading 35.04, dextrins and other edible modified starches of heading 35.05, sorbitol of heading 38.24, edible products of Chapter 39 (such as amylopectin and amylose of heading 39.13). It should be noted that this list of products is simply illustrative and should not be taken to be exhaustive.
>
> The mere presence of "foodstuffs or other substances with nutritive value" in a mixture would not suffice to exclude the mixture from Chapter 38, by application of Note 1(b). The mixtures which are excluded from Chapter 38 by virtue of Note 1(b) are those which are of a kind used in the preparation of human foodstuffs.

In accordance with the explanation in the ENs, we conclude that the 50/50 mixtures of sorbitol classified in heading 3824 (or 2905), and mannitol (sugar alcohols) classified in heading 2905, used as an artificial sweetener, are "foodstuffs or other substances with nutritive value" that "are of the kind used in the preparation of human foodstuffs", and are excluded from coverage in Chapter 38. Accordingly, this specific isomalt product is classified in subheading 2106.90.9998, HTSUS, as other food preparations not elsewhere specified or included.

As previously noted, your submission of November 6, 1997, concerned another isomalt product. This product is composed of two isomeric (diastereomeric) glycosides 6-0-α-D-glucopyranosyl-D-sorbitol and 1-0-α-D-glucopyranosyl-D-mannitol constituting 98% isomalt on the anhydrous basis. The remaining 2% is composed of unconverted starting materials, impurities present in the starting material, and by-products due to the synthesis. You further claim that "these impurities do not affect the properties of the product with respect to its use". Current literature recognizes that the above-named chemicals are non-natural, synthetic, stereoisomeric glycosides. (See Ullmann's Encyclopedia of Industrial Chemistry, Volume A5, Pages 79 thru 93 under the subject, "carbohydrates".) This means that they are not found in nature. Therefore they are excluded from heading 2938, HTSUS, as "glycosides, natural or reproduced by synthesis, and their salts, ethers, esters and other derivatives". This heading has been interpreted by Customs to apply only to a natural glycoside or one reproduced by synthesis in a manner so that its chemical structure is identical to the structure of a naturally occurring glycoside or derivative. (See Headquarters Ruling Letters 955128, dated December 16, 1994, 953124, dated November 8, 1994, 950133, dated August 3, 1993, 089540, dated October 19, 1992, concerning the interpretation by Customs of the term "natural or reproduced by synthesis".)

These glycosides are also known as disaccharide alcohols, meaning the glucose structure is attached to the alcohol via an ether linkage, and therefore can be considered sugar ethers. Subheading 2940.00.6000, HTSUS, provides for sugar ethers and sugar esters, and their salts, other than products of heading 2937, 2938, or 2939, and other than D-Arabinose. We agree that the isomalt product described in your letter of November 6, 1997, is

classified in subheading 2940.00.6000, HTSUS, provided that the remaining 2% of impurities are derived from the manufacturing process and are not deliberately left in the product with a view of rendering it suitable for specific rather than for general use. We are of the opinion that the remaining 2% of the product are impurities and do not have any significant role in changing the natural properties of the sugar ether.

Holding:

The isomalt product containing 50 percent of sorbitol and 50 percent of mannitol, as described in NYRL 849851, dated March 14, 1990, used as an artificial food sweetener, is of a kind used in the preparation of human foodstuffs and is excluded from coverage in Chapter 38 by application of Note 1(b). The product is classified as other food preparations not elsewhere specified or included, in subheading 2106.90.9998, HTSUS, with a 1998 general rate of 7.6 percent *ad valorem*.

NYRL 849851, dated March 14, 1990, is revoked. In accordance with 19 U.S.C. 1625, this revocation will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), of the Customs Regulations (19 CFR 177.10(c)(1)).

The isomalt product, as described in the comment submission of November 6, 1997, composed essentially of a 98% purity of the two isomers, 6-0-α-D-glucopyranosyl-D-sorbitol and 1-0-α-D-glucopyranosyl-D-mannitol with 2% impurities, is classified in subheading 2940.00.6000, HTSUS, as sugar ethers and sugar esters, and their salts, other than products of headings 2937, 2938, or 2939, and other than D-Arabinose, with a 1997 and a 1998 general rate of duty of 5.8 percent *ad valorem*. There is no delayed effective date for a prospective ruling covering this isomalt product.

JOHN T. ROTH,
(for John Durant, Director,
Commercial Rulings Division.)

U.S. Customs Service

Proposed Rulemakings

19 CFR Parts 10, 12, 18, 24, 111, 113, 114, 125, 134, 145, 162, 171, and 172

RIN 1515–AC01

PETITIONS FOR RELIEF; SEIZURES, PENALTIES, AND LIQUIDATED DAMAGES

AGENCY: Customs Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes significant amendments to Parts 171 and 172 of the Customs Regulations relating to the filing of petitions in penalty, liquidated damages, and seizure cases. The proposed regulations are briefer and are designed to allow more flexibility and useful contact with Government officials in an effort to administer cases in the most efficient way possible. These proposed regulations promote a more customer-friendly atmosphere and eliminate needless or redundant provisions. The affected Parts are recrafted to include petition processing in seizure and unsecured penalty cases under Part 171 and liquidated damages and secured penalty petition processing under Part 172.

DATES: Comments must be received on or before April 3, 1998.

ADDRESS: Comments (preferably in triplicate) may be submitted to the Office of Regulations and Rulings, Regulations Branch, Ronald Reagan Building, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229, and inspected at the Regulations Branch, Ronald Reagan Building, Suite 3000, 1300 Pennsylvania Avenue, NW, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Jeremy Baskin, Penalties Branch, Office of Regulations and Rulings, 202–927–2344.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Under the provisions of sections 618 and 623 of the Tariff Act of 1930, as amended (19 U.S.C. 1618 and 1623), and sections 320 of title 46,

United States Code App. (46 U.S.C.App. 320), and section 5321 of title 31, United States Code (31 U.S.C. 5321), the Secretary of the Treasury is empowered to remit forfeitures, mitigate penalties, or cancel claims arising from violation of Customs bonds upon terms and conditions that he deems appropriate. Under general rulemaking authority as provided by sections 66 and 624 of the Tariff Act of 1930, as amended (19 U.S.C. 66 and 1624), the Secretary is authorized to make such regulations necessary to carry out the provisions of the Tariff Act. Consistent with that authority, Parts 171 (relating to seizures and penalties) and 172 (relating to liquidated damages) of the Customs Regulations (19 CFR Parts 171 and 172) were promulgated to provide for the petitioning process in order to allow for the orderly remission of forfeitures, mitigation of penalties, and cancellation of claims for liquidated damages.

Customs is proposing significant amendments to Parts 171 and 172 of the Customs Regulations relating to the filing of petitions in penalty, liquidated damages, and seizure cases. The new regulations will be briefer and will allow more flexibility and useful contact with Government officials in an effort to administer cases in the most efficient way possible. These regulations will promote a more customer-friendly atmosphere and will eliminate needless or redundant provisions.

The scope of Parts 171 and 172 has been changed. Inasmuch as certain penalties are guaranteed by the conditions of the International Carrier Bond, and, therefore involve surety participation, the provisions of Part 172 will relate to all claims for liquidated damages and penalties secured by a bond. This will mean that all claims against surety will be handled in a consistent manner. Part 171 will relate to unsecured fines and penalties and all seizure and forfeiture cases.

The proposed regulations anticipate that electronic filing of petitions is an inevitability even though Customs does not currently have, on a nationwide basis, the capabilities to accept petitions electronically. Accordingly, the regulations reflect the acceptance of electronic signatures and eliminate the requirement of duplicate copies if an electronic petition is filed.

The proposed regulations require that petitions for relief must be signed by the petitioner, his attorney-at-law or a Customs broker, but will allow others, in certain non-commercial violations (such as passenger/baggage violations), to file petitions on behalf of non-English speaking claimants to property or other petitioners who have some disability that may impede the ability to file a petition. Instances have occurred where these petitions have been rejected because they did not meet the signature requirements of the old regulations. A strict reading of the current regulations would bar Customs from considering those petitions. This position causes needless delay in administrative processing of cases. The new proposed provision will open the process in these situations and promote efficiency by allowing, in non-commercial violations, a non-English speaking petitioner or petitioner who has a

disability which may impede his ability to file a petition to enlist a family member or other representative to file a petition on his behalf.

Under current regulation, Customs may limit the petitioning period to 7 days in cases involving violations of 19 U.S.C. 1592 when the running of the statute of limitations is imminent. Customs finds no reason to limit the 7-day petitioning period option to just 1592 cases. The proposed regulations extend the 7-day rule to all cases and clarify that it is 7 working days, rather than calendar days.

The current regulatory section entitled "Additional evidence required with certain petitions" is proposed to be eliminated as unnecessary. The provisions of proposed new § 171.2 indicate that the claimant or petitioner must establish a petitionable interest in seized property. How that proof is presented is not a subject that need be controlled by regulation.

Oral presentations will continue to be afforded as a matter of right in 1592 cases and only as a matter of discretion in other cases. The proposed regulations simply remove the reference to cases commenced subsequent to December 31, 1978. This provision has become obsolete with the passage of time.

Title VI of the North American Free Trade Agreement Implementation Act (known commonly as the Customs Modernization Act) (Pub.L. 103–182, 107 Stat. 2057) amended the provisions of 19 U.S.C. 1595a(c) to provide for the seizure and forfeiture of stolen property. Implementing regulations for this amendment were promulgated by Treasury Decision 96–2 (T.D. 96–2). This amendment has rendered § 171.22(c) obsolete, as those provisions of the new statute are applicable to any stolen property, not only that stolen in Canada and brought into the United States. Accordingly, it is proposed to no longer include that provision in the regulations.

Mitigation guidelines for monetary penalties assessed pursuant to 19 U.S.C. 1592 are currently published as Appendix B to Part 171 of the Regulations. Accordingly, the provisions of § 171.23 of the current regulations, making these guidelines available upon request, are obsolete and it is proposed that this section be eliminated.

The offices of Regional Commissioner and District Director were eliminated under Customs reorganization; therefore, all references to those offices and delegations of authority to those individuals to decide petitions and supplemental petitions for relief are obsolete. Through Treasury Decision 95–78 (T.D. 95–78), Customs published an Interim Rule which amended the regulations and authorized Fines, Penalties, and Forfeitures Officers to decide petitions for relief and certain designated Headquarters officials assigned to field locations to decide supplemental and second supplemental petitions for relief in certain cases (although this document proposes to eliminate second supplemental petitions, as discussed later herein). Those changes are reflected in this document.

Consistent with the reorganization and Customs policy of empowering employees, the proposed regulations remove specific delegations of mitigation authority from the body of regulatory text with the intention of affording the Secretary of the Treasury and the Commissioner of Customs the opportunity to delegate authority to decide petitions and supplemental petitions to the field through delegation orders, without the necessity of amending the regulations. A separate document will be published in the Federal Register detailing the new delegations.

The document proposes that the provisions of Part 111 be amended to eliminate the requirement of Headquarters approval of broker penalty cases assessed in excess of $10,000.

Novel or complex issues often arise concerning Customs policy with regard to Customs actions or potential actions relating to seizures and forfeitures, penalties (including penalty-based demands for duty), liquidated damages or case assessment or mitigation in cases that are otherwise within field jurisdiction because of the value of the property or the amount of the penalty or claim for liquidated damages. In those instances, Headquarters advice may need to be sought. Accordingly, the proposed regulations include a section in both Parts 171 and 172 to allow any Customs officer or an alleged violator to initiate a request for advice to be submitted to the Fines, Penalties, and Forfeitures Officer for forwarding to the Chief, Penalties Branch, Office of Regulations and Rulings. The Fines, Penalties, and Forfeitures Officer will retain the authority to refuse to forward any request that fails to raise a qualifying issue.

Under current policy, Customs officers are empowered to accept petitions filed untimely in response to claims for liquidated damages. Those petitions can be accepted at any time prior to determination that a claim is eligible to be placed on a surety sanction list. The proposed regulations will permit Customs to accept late petitions in penalty cases as well, but, as articulated in guidelines published for cancellation of bond charges (see T.D. 94–38), lateness in filing a petition may be considered when considering remission or mitigation of a claim and less generous relief, if otherwise merited, may be afforded to the petitioner who files in an untimely manner.

The courts have consistently held that a claim for liquidated damages is not a "charge or exaction" which is properly the subject of a protest filed pursuant to the authority of 19 U.S.C. 1514. *See United States v. Toshoku America, Inc.*, 879 F.2d 815 (Fed.Cir. 1989); *Halperin Shipping Co., Inc. v. United States*, 14 CIT 438, 742 F.Supp. 1163 (1990). In light of these decisions, the proposed regulations indicate that claims for liquidated damages and decisions on petitions are not properly the subject of a protest filed pursuant to 19 U.S.C. 1514.

In *Trayco, Inc. v. United States*, ____ Fed.Cir.(T) ____, 994 F.2d 832 (1993), the Court permitted a company that had petitioned for relief, received a decision on the petition and, although unhappy with the mitigation offered, paid that mitigated amount "under protest", to file suit

to recover the amount paid. The Court noted that as "* * * nothing in the statute or regulations gives notice that a party may relinquish its rights to judicial review by paying a mitigated penalty and filing a second supplemental petition, we decline to hold that Trayco is estopped where it accompanied its payment with a statement expressly reserving its rights to judicial review." *See Id.* at 839. Customs proposes to amend the regulations to provide that any payment made in compliance with a mitigation decision will act as an accord and satisfaction whereby the paying party has elected to resolve the case through the administrative process and has waived the right to sue for a refund. This express statement will also be included in all mitigation decisions offered to petitioners in order to provide full disclosure as to their administrative or judicial rights. Customs will not accept payments "under protest."

Additionally, in the proposed regulations, second supplemental petitions are eliminated. Therefore, payment of a mitigated amount will never be necessary to receive original or appellate administrative review and a petitioner will not be required to later sue for a refund of monies paid if he believes the underlying penalty was incorrectly assessed or the claim improperly mitigated.

The proposed regulations include a provision whereby the deciding Customs official reserves the right to require a waiver of the statute of limitations executed by the claimants to the property or charged party or parties as a condition precedent before accepting a supplemental petition in any case where the statute will be available as a defense to all or part of that case within one year from the date of decision on the original petition for relief. Upon receipt of such a waiver, any reduced time period for acceptance of a petition would not be necessary.

The proposed regulations remove a restriction on the filing of supplemental petitions in broker penalty cases. Under current § 111.95, Customs Regulations, a final determination of $1,000 or less in response to a petition for relief in a case involving assessment of a penalty for violation of the provisions of 19 U.S.C. 1641 may not be the subject of a supplemental petition. There is no basis to single out this particular violation as not being worthy of a supplemental petition for relief. All parties should have the same administrative rights.

It is noted that no changes are proposed to Subpart F, Part 171, of the current regulations relating to expedited procedures promulgated as a result of passage of the Anti-Drug Abuse Act of 1988 and applicable to certain administrative forfeiture proceedings.

Sections 10.39(e) and (f) of the current regulations, relating to the filing of petitions in cases involving breaches of the terms and conditions of temporary importation bonds (TIBs), provide for different standards of review if there has been a default with respect to all of the articles entered under bond or if there has been a default with respect to part, but not all, of the articles entered under bond. This bifurcation is unnecessary. The proposed regulations combine the provisions of §§ 10.39(e) and (f) to provide a single standard for review of TIB petitions without

regard to whether all or part of the merchandise entered under the TIB are in breach.

Current § 162.48, Customs Regulations, relating to the disposition of perishable and low-value property, permits Customs, by the authority granted in section 612 of the Tariff Act of 1930, as amended (19 U.S.C. 1612), to destroy summarily low-value seized property (less than $1,000) when the costs of storing and maintaining such property are disproportionate to its value. Customs would then reimburse any successful petitioning claimant from the Forfeiture Fund. The provisions of section 667 of the Customs Modernization Act remove this $1,000 cap and permit the summary destruction of any seized property, without regard to value, if the costs of maintaining such property are disproportionate to its value. The proposed amendment is consistent with this legislative change.

Finally, the provisions of Part 162 are proposed to be amended to specifically empower Fines, Penalties, and Forfeitures Officers to accept waivers of the statute of limitations with regard to actual or potential violations arising in ports over which they have jurisdiction. The Office of Regulations and Rulings would retain authority to accept waivers in established actual cases over which it has monetary jurisdiction and a petition for relief has been filed.

Proposed conforming amendments to Parts 10, 12, 18, 24, 111, 113, 114, 125, 134, 145, and 162 are also set forth in this document.

COMMENTS

Before making a determination in this matter, Customs will consider any written comments timely submitted. Comments will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), during regular business hours of 9:00 a.m. to 4:30 p.m. at the Regulations Branch, Suite 3000, Office of Regulations and Rulings, Ronald Reagan Building, 1300 Pennsylvania Avenue, NW., Washington, D.C.

REGULATORY FLEXIBILITY AND EXECUTIVE ORDER 12866

Inasmuch as small business entities are rarely repeat violators of Customs laws, and, therefore, will seldom need to avail themselves of these regulatory provisions and file petitions for relief on a regular basis, it is certified, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), that the proposed amendments, if adopted, will not have a significant economic impact on a substantial number of small entities. Accordingly, the amendments are not subject to the regulatory analysis requirements of 5 U.S.C. 603 and 604. The document does not meet the criteria for a "significant regulatory action" under E.O. 12866.

LIST OF SUBJECTS

19 CFR Part 10

Alterations, Bonds, Customs duties and inspection, Exports, Imports, Preference programs, Repairs, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 12

Bonds, Customs duties and inspection, Labeling, Marking, Prohibited merchandise, Reporting and recordkeeping requirements, Restricted merchandise, Seizure and forfeiture, Trade agreements.

19 CFR Part 18

Bonds, Customs duties and inspection, Penalties, Prohibited merchandise, Reporting and recordkeeping requirements.

19 CFR Part 24

Accounting, Claims, Customs duties and inspection, Financial and accounting procedures, Harbors, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 111

Administrative practice and procedure, Bonds, Brokers, Customs duties and inspection, Imports, Licensing, Penalties, Reporting and recordkeeping requirements.

19 CFR Part 113

Bonds, Customs duties and inspection, Exports, Foreign commerce and trade statistics, Freight, Imports, Reporting and recordkeeping requirements.

19 CFR Part 114

Carnets, Customs duties and inspection.

19 CFR Part 125

Bonds, Customs duties and inspection, Freight, Reporting and recordkeeping requirements.

19 CFR Part 134

Country of origin, Customs duties and inspection, Imports, Labeling, Marking, Packaging and containers, Reporting and recordkeeping requirements.

19 CFR Part 145

Customs duties and inspection, Imports, Mail, Postal service, Reporting and recordkeeping requirements.

19 CFR Part 162

Administrative practice and procedure, Customs duties and inspection, Law enforcement, Penalties, Prohibited merchandise, Reporting and recordkeeping requirements, Seizures and forfeitures.

19 CFR Part 171

Administrative practice and procedure, Customs duties and inspection, Law enforcement, Penalties, seizures, and forfeitures.

19 CFR Part 172

Administrative practice and procedure, Customs duties and inspection, Penalties.

PROPOSED AMENDMENTS TO THE REGULATIONS

For the reasons stated above, it is proposed to amend Parts 10, 12, 18, 24, 111, 113, 114, 125, 134, 145, 162, 171, and 172, Customs Regulations (19 CFR Parts 10, 12, 18, 24, 111, 113, 114, 125, 134, 145, 162, 171, and 172), as set forth below.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for Part 10 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314.

2. It is proposed to revise the introductory paragraph of § 10.39(e) to read as follows:

§ 10.39 Cancellation of bond charges.

* * * * * * *

(e) If there has been a default with respect to any or all of the articles covered by the bond and a written petition for relief is filed as provided in Part 172 of this chapter, it shall be reviewed by the Fines, Penalties, and Forfeitures Officer having jurisdiction in the port where the entry was filed. If the Fines, Penalties, and Forfeitures Officer is satisfied that the importation was properly entered under Chapter 98, subchapter XIII, and that there was no intent to defraud the revenue or delay the payment of duty, the Fines, Penalties, and Forfeitures Officer may cancel the liability for the payment of liquidated damages as follows:

* * * * * * *

3. It is proposed to amend § 10.39 by removing paragraph (f) and redesignating current paragraphs (g) and (h) respectively as paragraphs (f) and (g).

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The general authority citation and relevant specific authority citations for Part 12 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

* * * * * * *

Sections 12.95 through 12.103 also issued under 15 U.S.C. 1241–1245;

* * * * * * *

2. It is proposed to amend § 12.102 by removing the number "60" and adding in its place the number "30".

PART 18—TRANSPORTATION IN BOND AND MERCHANDISE IN TRANSIT

1. The general authority citation and relevant specific authority citations for Part 18 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1551, 1552, 1553, 1624.

* * * * * * *

Section 18.8 also issued under 19 U.S.C. 1623;

* * * * * * *

2. It is proposed to revise § 18.8(d) to read as follows:

§ 18.8 Liability for shortage, irregular delivery, or non-delivery; penalties.

* * * * * * *

(d) In any case in which liquidated damages are imposed in accordance with this section and the Fines, Penalties, and Forfeitures Officer is satisfied by evidence submitted to him with a petition for relief filed in accordance with the provisions of Part 172 of this chapter that any violation of the terms and conditions of the bond occurred without any intent to evade any law or regulation, the Fines, Penalties, and Forfeitures Officer, in accordance with delegated authority, may cancel such claim upon the payment of any lesser amount or without the payment of any amount as may be deemed appropriate under the law and in view of the circumstances.

* * * * * * *

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The general authority citation and relevant specific authority citations for Part 24 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1624; 31 U.S.C. 9701;

* * * * * * *

Section 24.24 also issued under 26 U.S.C. 4461, 4462;

* * * * * * *

2. It is proposed to amend the first sentence of § 24.24(h)(3) by removing the phrase "published pursuant to the provisions of § 172.22(d)(1) of this chapter".

PART 111—CUSTOMS BROKERS

1. The general authority citation for Part 111 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1624, 1641.

2. It is proposed to amend § 111.92 by removing the last sentence.

3. It is proposed to revise § 111.95 to read as follows:

§ 111.95 Supplemental petition for relief.

A decision of the Fines, Penalties, and Forfeitures Officer with regard to any petition filed in accordance with Part 171 of this chapter may be the subject of a supplemental petition for relief. Any supplemental petition also must be filed in accordance with the provisions of Part 171 of this chapter.

PART 113—CUSTOMS BONDS

1. The general authority citation and relevant specific authority citation for Part 113 continue to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624.

Subpart E also issued under 19 U.S.C. 1484, 1551, 1565.

2. It is proposed to revise § 113.46 to read as follows:

§ 113.46 Cancellation of bond charges resulting from failure to produce documents.

Guidelines published by the Commissioner of Customs set forth provisions relating to cancellation of bond charges resulting from failure to produce documents.

3. It is proposed to amend § 113.52 by removing the words "and 172.22(c)" from the parenthetical phrase contained therein.

4. It is proposed to amend § 113.54(a) by removing "172.31" and adding in its place "172.11(b)".

PART 114—CARNETS

1. The general authority citation for Part 114 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624.

2. It is proposed to amend § 114.34(c) by removing the final non-parenthetical sentence and the final parenthetical sentence.

PART 125—CARTAGE AND LIGHTERAGE OF MERCHANDISE

1. The general authority citation and relevant specific authority citation for Part 125 continue to read as follows:

Authority: 19 U.S.C. 66, 1565, 1624.

* * * * * * *

Sections 125.41 and 125.42 also issued under 19 U.S.C. 1623.

2. It is proposed to revise § 125.42 to read as follows:

§ 125.42 Cancellation of liability.

The Fines, Penalties, and Forfeitures Officer, in accordance with delegated authority, may cancel liquidated damages incurred under the bond of the foreign trade zone operator, containing the bond conditions set forth in § 113.73 of this chapter, or under the bond of the cartman, lighterman, bonded carrier, bonded warehouse operator, container sta-

tion operator or centralized examination station operator on Customs Form 301, containing the bond conditions set forth in § 113.63 of this chapter, upon the payment of such lesser amount, or without the payment of any amount, as the Fines, Penalties, and Forfeitures Officer may deem appropriate under the circumstances. Application for cancellation of liquidated damages incurred shall be made in accordance with the provisions of Part 172 of this chapter.

PART 134—COUNTRY OF ORIGIN MARKING

1. The general authority citation and relevant specific authority citation for Part 134 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1304, 1624.

2. It is proposed to revise § 134.54(a) by removing the phrase "plus any estimated duty thereon as determined at the time of entry."

3. It is proposed to revise § 134.54(b) by removing the second sentence.

PART 145—MAIL IMPORTATIONS

1. The general authority citation and relevant specific authority citation for Part 145 continue to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1624.

Section 145.4 also issued under 18 U.S.C. 545, 19 U.S.C. 1618.

* * * * * * *

2. It is proposed to revise § 145.4(b) to read as follows:

§ 145.4 Dutiable merchandise without declaration or invoice, prohibited merchandise, and merchandise imported contrary to law.

* * * * * * *

(b) *Mitigation of forfeiture.* Any claimant incurring a forfeiture of merchandise for violation of this section may file a petition for relief pursuant to Part 171 of this chapter. Mitigation of that forfeiture may occur consistent with mitigation guidelines.

* * * * * * *

PART 162—RECORDKEEPING, INSPECTION, SEARCH AND SEIZURE

1. The general authority citation and relevant specific authority citation for Part 162 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624.

* * * * * * *

Section 162.48 also issued under 19 U.S.C. 1606, 1607, 1608, 1612, 1613b, 1618;

* * * * * * *

2. It is proposed to amend § 162.48 by revising the heading to read as follows:

§ 162.48 Disposition of perishable and other seized property.

3. It is proposed to amend paragraph (b) of § 162.48 by removing from the first sentence the phrase "and such value is less than $1,000,".

4. It is proposed to amend § 162.79b by removing the last sentence.

5. It is proposed to amend Subpart G, Part 162 by adding a new § 162.81 to read as follows:

§ 162.81 Statute of limitation waivers.

Waivers of the statute of limitations in any matter relating to any actual or potential penalty, seizure or claim for liquidated damages may be accepted by any Fines, Penalties, and Forfeitures Officer except that waivers of the statute of limitations submitted with regard to any penalty, seizure or liquidated damages case in which a petition has been filed and is under review by the Chief, Penalties Branch, Office of Regulations and Rulings, or the Secretary of the Treasury or his designee, shall be accepted by the Chief, Penalties Branch, Office of Regulations and Rulings.

PART 171—FINES, PENALTIES, AND FORFEITURES

1. The authority citation for Part 171 continues to read as follows:

Authority: 19 U.S.C. 66, 1592, 1618, 1624. The provisions of subpart C also issued under 22 U.S.C. 401; 46 U.S.C.App. 320 unless otherwise noted.

Subpart F also issued under 19 U.S.C. 1595a, 1605, 1624; 21 U.S.C. 881 note.

2. It is proposed to revise § 171.0 to read as follows:

§ 171.0 Scope.

This part contains provisions relating to petitions for relief from fines, forfeitures, and certain penalties incurred, and petitions for the restoration of proceeds from sale of seized and forfeited property. This part does not relate to petitions on claims for liquidated damages or penalties which are guaranteed by the conditions of the International Carrier Bond (see § 113.64 of this Chapter).

3. It is proposed to revise subparts A through E of Part 171 to read as follows:

SUBPART A—APPLICATION FOR RELIEF

§ 171.1 Petition for relief.

(a) *To whom addressed.* Petitions for the remission or mitigation of a fine, penalty, or forfeiture incurred under any law administered by Customs shall be addressed to the Fines, Penalties, and Forfeitures Officer designated in the notice of claim.

(b) *Signature.* The petition for remission or mitigation shall be signed by the petitioner, his attorney-at-law or a Customs broker. If the petitioner is a corporation, the petition may be signed by an officer or responsible supervisory official of the corporation, or a representative of the corporation. Electronic signatures are acceptable. In non-com-

mercial violations, a non-English speaking petitioner or petitioner who has a disability which may impede his ability to file a petition may enlist a family member or other representative to file a petition on his behalf. The deciding officer may, in his or her discretion, require proof of representation before consideration of any petition.

(c) *Form.* The petition for remission or mitigation need not be in any particular form. It shall set forth the following:

(1) A description of the property involved (if a seizure);

(2) The date and place of the violation or seizure;

(3) The facts and circumstances relied upon by the petitioner to justify remission or mitigation; and

(4) If a seizure case, proof of a petitionable interest in the seized property.

(d) *False statement in petition.* A false statement contained in a petition may subject the petitioner to prosecution under the provisions of 18 U.S.C. 1001.

§ 171.2 Filing a petition.

(a) *Where filed.* A petition for relief shall be filed with the Fines, Penalties, and Forfeitures office whose address is given in the notice.

(b) *When filed.*

(1) *Seizures.* Petitions for relief from seizures shall be filed within 30 days from the date of mailing of the notice of seizure.

(2) *Penalties.* Petitions for relief from penalties shall be filed within 60 days of the mailing of the notice of penalty incurred.

(c) *Extensions.* The Fines, Penalties, and Forfeitures Officer is empowered to grant extensions of time to file petitions when the circumstances so warrant.

(d) *Number of copies.* The petition shall be filed in duplicate unless filed electronically.

(e) *Exception for certain cases.* If a penalty is assessed or a seizure is made and fewer than 180 days remain from the date of penalty notice or seizure before the statute of limitations may be asserted as a defense, the Fines, Penalties, and Forfeitures Officer may specify in the notice a reasonable period of time, but not less than 7 working days, for the filing of a petition for relief. If a petition is not filed within the time specified, the matter shall be transmitted promptly to the appropriate Office of the Chief Counsel for referral to the Department of Justice.

§ 171.3 Oral presentations seeking relief.

(a) *For violation of section 592.* If the penalty incurred is for a violation of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), the person named in the notice, in addition to filing a petition, may make an oral presentation seeking relief in accordance with this paragraph. For purposes of this paragraph, a proceeding commences with the issuance of a prepenalty notice or, if no prepenalty notice is issued, with the issuance of a notice of claim or a monetary penalty.

(b) *Other oral presentations.* Oral presentations other than those provided in paragraph (a) of this section may be allowed in the discretion of

any official of the Customs Service or Department of the Treasury authorized to act on a petition or supplemental petition.

SUBPART B—ACTIONS ON PETITIONS

§ 171.11 Petitions acted on by Fines, Penalties, and Forfeitures Officer.

(a) *Remission or mitigation authority.* Upon receipt of a petition for relief submitted pursuant to the provisions of section 618 of the Tariff Act of 1930, as amended (19 U.S.C. 1618), or section 5321(c) of title 31, United States Code (31 U.S.C. 5321(c)), or section 320 of title 46, United States Code App. (46 U.S.C.App. 320), the Fines, Penalties, and Forfeitures Officer is empowered to remit or mitigate on such terms and conditions as, under law and in view of the circumstances, he or she shall deem appropriate in accordance with appropriate delegations of authority.

(b) *When violation did not occur.* Notwithstanding any other delegation of authority, the Fines, Penalties, and Forfeitures Officer is always empowered to cancel any claim when he or she definitely determines that the act or omission forming the basis of any claim of penalty or forfeiture did not occur.

(c) *When violation is result of vessel in distress.* The Fines, Penalties, and Forfeitures Officer may remit without payment any penalty which arises for violation of the coastwise laws if he or she is satisfied that the violation occurred as a direct result of an arrival of the transporting vessel in distress.

§ 171.12 Petitions referred to Customs Headquarters.

Upon receipt of a petition for relief filed pursuant to the provisions of section 618 of the Tariff Act of 1930, as amended (19 U.S.C. 1618), section 5321(c) of title 31, United States Code (31 U.S.C. 5321(c)), or section 320 of title 46, United States Code App. (46 U.S.C.App. 320), involving fines, penalties, and forfeitures which are outside of his or her delegated authority, the Fines, Penalties, and Forfeitures Officer shall refer that petition to the Chief, Penalties Branch, Office of Regulations and Rulings, Customs Headquarters, who is empowered to remit or mitigate on such terms and conditions as, under law and in view of the circumstances, he or she shall deem appropriate, unless there has been no delegation of authority to act by the Secretary of the Treasury or his designee. In those cases where there has been no delegation to act by the Secretary or his designee, the Chief, Penalties Branch, shall forward the matter to the Department with a recommendation.

§ 171.13 Limitations on consideration of petitions.

(a) *Late petitions.* Petitions filed after the expiration of the 30 or 60-day petitioning period may be considered by the deciding official if, in his or her discretion, the efficient administration of justice would be met.

(b) *Cases referred for institution of legal proceedings.* No action shall be taken on any petition after the case has been referred to the Depart-

ment of Justice for institution of legal proceedings. The petition shall be forwarded to the Department of Justice.

(c) *Conveyance awarded for official use.* No petition for remission of forfeiture of a seized conveyance which has been forfeited and retained for official use shall be considered unless it is filed before final disposition of the property is made. This does not affect petitions for restoration of proceeds of sale filed pursuant to the provisions of section 613 of the Tariff Act of 1930, as amended (19 U.S.C. 1613).

§ 171.14 Headquarters advice.

The advice of the Director, International Trade Compliance Division, Office of Regulations and Rulings, Customs Headquarters, may be sought in any case, without regard to delegated authority to act on a petition or offer, when a novel or complex issue concerning a ruling, policy, or procedure is presented concerning a Customs action(s) or potential Customs action(s) relating to seizures and forfeitures, penalties (including penalty-based demands for duty), or mitigating or remitting any claim. The request for advice may be initiated by the alleged violator or any Customs officer, but must be submitted to the Fines, Penalties, and Forfeitures Officer. The Fines, Penalties, and Forfeitures Officer retains the authority to refuse to forward any request that fails to raise a qualifying issue and to seek legal advice from the appropriate Associate or Assistant Chief Counsel in such cases.

SUBPART C—DISPOSITION OF PETITIONS

§ 171.21 Written decisions.

If a petition for relief relates to a violation of sections 592 or 641, Tariff Act of 1930, as amended (19 U.S.C. 1592 or 19 U.S.C. 1641), the petitioner shall be provided with a written statement setting forth the decision on the matter and the findings of fact and conclusions of law upon which the decision is based.

§ 171.22 Limitation on time decision effective.

A decision to mitigate a penalty or to remit a forfeiture upon condition that a stated amount is paid shall be effective for not more than 60 days from the date of notice to the petitioner of such decision unless the decision itself prescribes a different effective period. If payment of the stated amount or arrangements for such payment are not made, or a supplemental petition is not filed in accordance with regulation, the full penalty or claim for forfeiture shall be deemed applicable and shall be enforced by promptly referring the matter, after required collection action, if appropriate, to the appropriate Office of the Chief Counsel for preparation for referral to the Department of Justice unless other action has been directed by the Commissioner of Customs.

§ 171.23 Decisions not protestable.

(a) *Mitigation decision not subject to protest.* Any decision to remit a forfeiture or mitigate a penalty is not a protestable decision as defined under the provisions of 19 U.S.C. 1514. Any payment made in com-

pliance with any decision to remit a forfeiture or mitigate a penalty is not a charge or exaction and therefore is not a protestable action as defined under the provisions of 19 U.S.C. 1514.

(b) *Payment of mitigated amount as accord and satisfaction*. Payment of a mitigated amount in compliance with an administrative decision on a petition or supplemental petition for relief shall be considered an election of administrative proceedings and full disposition of the case. Payment of a mitigated amount will act as an accord and satisfaction of the Government claim. Payment of a mitigated amount will never serve as a bar to filing a supplemental petition for relief.

SUBPART D—OFFERS IN COMPROMISE

§ 171.31 Form of offers.

Offers in compromise submitted pursuant to the provisions of section 617 of the Tariff Act of 1930, as amended (19 U.S.C. 1617), must expressly state that they are being submitted in accordance with the provisions of that section. The amount of the offer must be deposited with Customs in accordance with the provisions of § 161.5 of this Chapter.

§ 171.32 Authority to accept offers.

The authority to accept offers in compromise, when recommended by the General Counsel of the Treasury or his designee, resides with the official having authority to decide a petition for relief.

§ 171.33 Acceptance of offers in compromise.

An offer in compromise shall be considered accepted only when the offeror is so notified in writing. As a condition to accepting an offer in compromise, the offeror may be required to enter into any collateral agreement or to post any security which is deemed necessary for the protection of the interest of the United States.

SUBPART E—RESTORATION OF PROCEEDS OF SALE

§ 171.41 Application of provisions for petitions for relief.

The general provisions of Subpart B of this part on filing and content of petitions for relief apply to petitions for restoration of proceeds of sale except insofar as modified by this subpart.

§ 171.42 Time limit for filing petition for restoration.

A petition for the restoration of proceeds of sale under section 613, Tariff Act of 1930, as amended (19 U.S.C. 1613) shall be filed within 3 months after the date of the sale.

§ 171.43 Evidence required.

In addition to such other evidence as may be required under the provisions of subpart B of this part, the petition for restoration of proceeds of sale under section 613, Tariff Act of 1930, as amended (19 U.S.C. 1613), shall show the interest of the petitioner in the property. The petition shall be supported by satisfactory proof that the petitioner did not know of the seizure prior to the declaration or decree of forfeiture and was in such circumstances as prevented him from knowing of it.

§ 171.44 Forfeited property authorized for official use.

If forfeited property which is the subject of a claim under section 613, Tariff Act of 1930, as amended (19 U.S.C. 1613) has been authorized for official use, retention or delivery shall be regarded as the sale thereof for the purposes of section 613. The appropriation available to the receiving agency for the purchase, hire, operation, maintenance and repair of property of the kind so received is available for the granting of relief to the claimant and for the satisfaction of liens for freight, charges and contributions in general average that may have been filed.

4. It is proposed to revise Part 171 by adding a new subpart G to read as follows:

SUBPART G—SUPPLEMENTAL PETITIONS FOR RELIEF

§ 171.61 Time and place of filing.

If the petitioner is not satisfied with a decision of the deciding official on an original petition for relief, a supplemental petition may be filed with the Fines, Penalties, and Forfeitures Officer having jurisdiction in the port where the violation occurred. Such supplemental petition shall be filed within 60 days from the date of notice to the petitioner of the decision from which further relief is requested unless another time to file such a supplemental petition is prescribed in the decision. A supplemental petition may be filed whether or not the mitigated penalty or forfeiture remission amount designated in the decision on the original petition is paid.

§ 171.62 Supplemental petition decision authority.

(a) *Decisions of Fines, Penalties, and Forfeitures Officers.* Supplemental petitions filed on cases where the original decision was made by the Fines, Penalties, and Forfeitures Officer, shall be initially reviewed by that official. The Fines, Penalties, and Forfeitures Officer may choose to grant more relief and issue a decision indicating same to the petitioner. If the petitioner is dissatisfied with the further relief granted or if the Fines, Penalties, and Forfeitures Officer decides to grant no further relief, the supplemental petition shall be forwarded to a designated Headquarters official assigned to a field location for review and decision, except that supplemental petitions filed in cases involving violations of 19 U.S.C. 1641 where the amount of the penalty assessed exceeds $10,000 shall be forwarded to the Chief, Penalties Branch, Office of Regulations and Rulings.

(b) *Decisions of Customs Headquarters.* Supplemental petitions filed on cases where the original decision was made by the Chief, Penalties Branch, Office of Regulations and Rulings, Customs Headquarters, shall be forwarded to the Director, International Trade Compliance Division, Customs Headquarters, for review and decision.

(c) *Decisions of Treasury Department.* Supplemental petitions filed on cases where the original decision was made in the Treasury Department, shall be referred to the Chief, Penalties Branch, Office of Regula-

tions and Rulings, Customs Headquarters, who shall forward the supplemental petitions to the Department with a recommendation.

(d) *Authority of Assistant Commissioner.* Any authority given to any Headquarters official by this part may also be exercised by the Assistant Commissioner, Office of Regulations and Rulings, or his designee.

§ 171.63 Appeals to the Secretary of the Treasury in certain 1592 cases.

A petitioner filing a supplemental petition pursuant to this subpart from a decision of the Chief, Penalties Branch, Office of Regulations and Rulings, with respect to any liability assessed under 19 U.S.C. 1592 may request that the petition be accepted as an appeal to the Secretary of the Treasury. The Secretary or his designee will accept for decision any such supplemental petition when in his discretion he determines that such petition raises a question of fact, law or policy of such importance as to require a decision by the Secretary. If the Secretary or his designee declines to accept an appeal for decision, the petitioner will be so informed. In such a case, a decision will be issued thereon by the Director, International Trade Compliance Division.

§ 171.64 Waiver of statute of limitations.

The deciding official always reserves the right to require a waiver of the statute of limitations executed by the claimants to the property or charged party or parties as a condition precedent before accepting a petition for relief or a supplemental petition in any case where the statute will be available as a defense to all or part of that case within one year from the date of decision on the original petition for relief.

PART 172—CLAIMS FOR LIQUIDATED DAMAGES; PENALTIES SECURED BY BONDS

1. The authority citation for Part 172 is revised to read as follows:

Authority: 19 U.S.C. 66, 1618, 1623, 1624.

2. It is proposed to revise Part 172, including its heading, to read as follows:

CLAIMS FOR LIQUIDATED DAMAGES; PENALTIES SECURED BY BONDS

§ 172.0 Scope.

This part contains provisions relating to petitions for relief from claims for liquidated damages arising under any Customs bond and penalties incurred which are secured by the conditions of the International Carrier Bond (See § 113.64 of this Chapter). This part does not relate to petitions on unsecured fines or penalties or seizures and forfeitures, nor does it relate to petitions for the restoration of proceeds of sale pursuant to 19 U.S.C. 1613.

SUBPART A—NOTICE OF CLAIM AND APPLICATION FOR RELIEF

§ 172.1 Notice of liquidated damages or penalty incurred and right to petition for relief.

(a) *Notice of liquidated damages or penalty incurred.* When there is a failure to meet the conditions of any bond posted with Customs or when

a violation occurs which results in assessment of a penalty which is secured by a Customs bond, the principal shall be notified in writing of any liability for liquidated damages or penalty incurred and a demand shall be made for payment. The sureties on such bond shall also be notified in writing of any such liability at the same time.

(b) *Notice of right to petition for relief.* The notice shall inform the principal that application may be made for relief from payment of liquidated damages or penalty.

§ 172.2 Petition for relief.

(a) *To whom addressed.* Petitions for the cancellation of any claim for liquidated damages or remission or mitigation of a fine or penalty secured by a Customs bond incurred under any law or regulation administered by Customs shall be addressed to the Fines, Penalties, and Forfeitures Officer designated in the notice of claim.

(b) *Signature.* The petition for remission or mitigation shall be signed by the petitioner, his attorney-at-law or a Customs broker. If the petitioner is a corporation, the petition may be signed by an officer or responsible supervisory official of the corporation, or a representative of the corporation. Electronic signatures are acceptable. The deciding officer may, in his or her discretion, require proof of representation before consideration of any petition.

(c) *Form.* The petition for cancellation, remission or mitigation need not be in any particular form. It shall set forth the following:

(1) The date and place of the violation; and

(2) The facts and circumstances relied upon by the petitioner to justify cancellation, remission or mitigation.

(d) *False statement in petition.* A false statement contained in a petition may subject the petitioner to prosecution under the provisions of 18 U.S.C. 1001.

§ 172.3 Filing a petition.

(a) *Where filed.* A petition for relief shall be filed by the bond principal with the Fines, Penalties, and Forfeitures office whose address is given in the notice.

(b) *When filed.* Petitions for relief shall be filed within 60 days from the date of mailing to the bond principal the notice of claim for liquidated damages or penalty secured by a bond.

(c) *Extensions.* The Fines, Penalties, and Forfeitures Officer is empowered to grant extensions of time to file petitions when the circumstances so warrant.

(d) *Number of copies.* The petition shall be filed in duplicate unless filed electronically.

(e) *Exception for certain cases.* If a penalty or claim for liquidated damages is assessed and fewer than 180 days remain from the date of penalty or liquidated damages notice before the statute of limitations may be asserted as a defense, the Fines, Penalties, and Forfeitures Officer may specify in the notice a reasonable period of time, but not less than 7 working days, for the filing of a petition for relief. If a petition is

not filed within the time specified, the matter shall be transmitted promptly to the appropriate Office of the Chief Counsel for referral to the Department of Justice.

§ 172.4 Demand on surety.

If the principal fails to file a petition for relief or fails to comply in the prescribed time with a decision to mitigate a penalty or cancel a claim for liquidated damages issued with regard to a petition for relief, Customs shall make a demand for payment on surety. Surety will then have 60 days from the date of the demand to file a petition for relief.

SUBPART B—ACTIONS ON PETITIONS

§ 172.11 Petitions acted on by Fines, Penalties, and Forfeitures Officer.

(a) *Mitigation or cancellation authority.* Upon receipt of a petition for relief submitted pursuant to the provisions of section 618 or 623 of the Tariff Act of 1930, as amended (19 U.S.C. 1618 or 19 U.S.C. 1623), or section 320 of title 46, United States Code App. (46 U.S.C.App. 320), the Fines, Penalties, and Forfeitures Officer, notwithstanding any other regulation, is empowered to mitigate any penalty or cancel any claim for liquidated damages on such terms and conditions as, under law and in view of the circumstances, he or she shall deem appropriate in accordance with appropriate delegations of authority.

(b) *When violation did not occur.* Notwithstanding any other delegation of authority, the Fines, Penalties, and Forfeitures Officer is always empowered to cancel any case without payment of a mitigated or cancellation amount when he or she definitely determines that the act or omission forming the basis of any claim of penalty or claim for liquidated damages did not occur.

§ 172.12 Petitions acted on at Customs Headquarters.

Upon receipt of a petition for relief filed pursuant to the provisions of section 618 or 623 of the Tariff Act of 1930, as amended (19 U.S.C. 1618 or 19 U.S.C. 1623), or section 320 of title 46, United States Code App. (46 U.S.C. App. 320), involving fines, penalties, and claims for liquidated damages which are outside of his or her jurisdiction, the Fines, Penalties, and Forfeitures Officer shall refer that petition to the Chief, Penalties Branch, Office of Regulations and Rulings, Customs Headquarters, who is empowered, notwithstanding any other regulation, to mitigate penalties or cancel bond claims on such terms and conditions as, under law and in view of the circumstances, he or she shall deem appropriate.

§ 172.13 Limitations on consideration of petitions.

(a) *Late petitions.* Petitions f-day petitioning period may be considered by the deciding official if, in his or her discretion, the efficient administration of justice would be met.

(b) *Cases referred for institution of legal proceedings.* No action shall be taken on any petition if the civil liability has been referred to the Department of Justice for institution of legal proceedings. The petition shall be forwarded to the Department of Justice.

(c) *Delinquent sureties.* No action shall be taken on any petition from a principal or surety if received after the issuance to surety of a notice to show cause pursuant to the provisions of § 113.38(c)(3) of this Chapter.

§ 172.14 Headquarters advice.

The advice of the Director, International Trade Compliance Division, Office of Regulations and Rulings, Customs Headquarters, may be sought in any case, without regard to jurisdictional amount, when a novel or complex issue concerning a ruling, policy, or procedure is presented concerning a Customs action(s) or potential Customs action(s) relating to penalties secured by bonds (including penalty-based demands for duty), claims for liquidated damages or mitigating any claim. The request for advice may be initiated by the bond principal, surety or any Customs officer, but must be submitted to the Fines, Penalties, and Forfeitures Officer. The Fines, Penalties, and Forfeitures Officer retains the authority to refuse to forward any request that fails to raise a qualifying issue and to seek legal advice from the appropriate Associate or Assistant Chief Counsel in such cases.

SUBPART C—DISPOSITION OF PETITIONS

§ 172.21 Limitation on time decision effective.

A decision to mitigate a penalty or to cancel a claim for liquidated damages upon condition that a stated amount is paid shall be effective for not more than 60 days from the date of notice to the petitioner of such decision unless the decision itself prescribes a different effective period. If payment of the stated amount is not made or a petition or a supplemental petition is not filed in accordance with regulation, the full penalty or claim for liquidated damages shall be deemed applicable and shall be enforced by promptly transmitting the matter, after required collection action, if appropriate, to the appropriate office of the Chief Counsel for preparation for referral to the Department of Justice unless other action has been directed by the Commissioner of Customs. Any such case may also be the basis for a sanction action commenced in accordance with regulations in this Chapter.

§ 172.22 Decisions not protestable.

(a) *Mitigation decision not subject to protest.* Any decision to remit or mitigate a penalty or cancel a claim for liquidated damages upon payment of a lesser amount is not a protestable decision as defined under the provisions of 19 U.S.C. 1514. Any payment made in compliance with any decision to remit or mitigate a penalty or cancel a claim for liquidated damages upon payment of a lesser amount is not a charge or exaction and therefore is not a protestable action as defined under the provisions of 19 U.S.C. 1514.

(b) *Payment of mitigated or cancellation amount as accord and satisfaction.* Payment of a mitigated or cancellation amount in compliance with an administrative decision on a petition or supplemental petition for relief shall be considered an election of administrative proceedings and full disposition of the case. Payment of a mitigated or cancellation

amount will act as an accord and satisfaction of the Government claim. Payment of a mitigated or n for relief.

SUBPART D—OFFERS IN COMPROMISE

§ 172.31 Form of offers.

Offers in compromise submitted pursuant to the provisions of section 617 of the Tariff Act of 1930, as amended (19 U.S.C. 1617), must expressly state that they are being submitted in accordance with the provisions of that section. The amount of the offer must be deposited with Customs in accordance with the provisions of § 161.5 of this Chapter.

§ 172.32 Authority to accept offers.

The authority to accept offers in compromise, when recommended by the General Counsel of the Treasury or his designee, resides with the official having authority to decide a petition for relief, except that offers in compromise submitted with regard to penalties secured by a bond or claims for liquidated damages which are the subject of a letter to show cause issued to a surety in anticipation of possible sanction action authorized under the provisions of Part 113 of this chapter shall be accepted by the designated Headquarters official who issued the show cause letter.

§ 172.33 Acceptance of offers in compromise.

An offer in compromise shall be considered accepted only when the offeror is so notified in writing. As a condition to accepting an offer in compromise, the offeror may be required to enter into any collateral agreement or to post any security which is deemed necessary for the protection of the interest of the United States.

SUBPART E—SUPPLEMENTAL PETITIONS FOR RELIEF

§ 172.41 Time and place of filing.

If the petitioner is not satisfied with a decision of the deciding official on an original petition for relief, a supplemental petition may be filed with the Fines, Penalties, and Forfeitures Officer having jurisdiction in the port where the violation occurred. Such supplemental petition shall be filed within 60 days from the date of notice to the petitioner of the decision from which further relief is requested unless another time to file such a supplemental petition is prescribed in the decision. A supplemental petition may be filed whether or not the mitigated amount designated in the decision on the original petition is paid.

§ 172.42 Supplemental petition decision authority.

(a) *Decisions of Fines, Penalties, and Forfeitures Officers.* Supplemental petitions filed on cases where the original decision was made by the Fines, Penalties, and Forfeitures Officer, shall be initially reviewed by that official. The Fines, Penalties, and Forfeitures Officer may choose to grant more relief and issue a decision indicating same to the petitioner. If the petitioner is dissatisfied with the further relief granted or if the Fines, Penalties, and Forfeitures Officers decides to grant no further re-

lief, the supplemental petition shall be forwarded to a designated Headquarters official assigned to a field location for review and decision.

(b) *Decisions of Customs Headquarters.* Supplemental petitions filed on cases where the original decision was made by the Chief, Penalties Branch, Office of Regulations and Rulings, Customs Headquarters, shall be forwarded to the Director, International Trade Compliance Division, for review and decision.

(c) *Authority of Assistant Commissioner.* Any authority given to any Headquarters official by this part may also be exercised by the Assistant Commissioner, Office of Regulations and Rulings, or his designee.

§ 172.43 Waiver of statute of limitations.

The deciding official always reserves the right to require a waiver of the statute of limitations executed by the charged party or parties as a condition precedent before accepting a supplemental petition in any case where the statute will be available as a defense to all or part of that case within one year from the date of decision on the original petition for relief.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: January 13, 1998.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, February 2, 1998 (63 FR 5329)]

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19 CFR Part 10

RIN 1515–AB59

ANDEAN TRADE PREFERENCE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to implement the duty preference provisions of the Andean Trade Preference Act (the Act). The document sets forth the country of origin and related rules which apply for purposes of duty-free or reduced-duty treatment on imported goods under the Act and specifies the documentary and other procedural requirements which apply to any claim for such preferential tariff treatment under the Act.

DATES: Comments must be received on or before March 31, 1998.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Suite 3000, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT:

Operational Aspects: Tony Mazzoccoli, Office of Field Operations (202–927–0564).

Legal Aspects: Craig Walker, Office of Regulations and Rulings (202–927–1116).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 4, 1991, President Bush signed into law the Andean Trade Preference Act (Public Law 102–182, Title II, §§ 201–206, 105 Stat. 1236–1244) ("the Act", commonly referred to as the ATPA), the provisions of which are codified at 19 U.S.C. 3201 through 3206. Sections 202 and 204(c) of the Act (19 U.S.C. 3201 and 3203(c)) authorize the President to proclaim duty-free treatment for all eligible articles, and duty reductions for certain other goods, from any country designated by the President as a beneficiary country pursuant to section 203 of the Act (19 U.S.C. 3202). On July 2, 1992, President Bush signed Proclamation 6455 (57 FR 30069) which (1) proclaimed the duty treatment authorized by the Act, (2) designated Colombia as a beneficiary country for purposes of the Act, and (3) modified the Harmonized Tariff Schedule of the United States (HTSUS) to incorporate the substance of the relevant provisions of the Act; under the terms of the proclamation, the proclaimed duty treatment was effective with respect to articles entered, or withdrawn from warehouse for consumption, on or after July 22, 1992. On the same date President Bush signed Proclamation 6456 (57 FR 30097) designating Bolivia as a beneficiary country for purposes of the Act, similarly effective July 22, 1992. On April 13, 1993, President Clinton signed Proclamation 6544 (58 FR 19547) which, among other things, designated Ecuador as a beneficiary country for purposes of the Act, effective April 30, 1993. On August 11, 1993, President Clinton signed Proclamation 6585 (58 FR 43239) designating Peru as a beneficiary country for purposes of the Act, effective August 26, 1993. The modifications to the HTSUS contained in Proclamation 6455 setting forth the substance of the relevant provisions of the Act are now contained in General Note 11, HTSUS, and eligible articles and other goods to which preferential duty treatment under the Act applies are identified within the HTSUS by the designation "J" appearing with or without an asterisk in the "Special" rate of duty subcolumn.

Sections 204(a)–(c) of the Act (19 U.S.C. 3203(a)–(c)) set forth the standards which govern the eligibility of articles for duty-free or re-

duced-duty treatment under the Act. Section 204(a), which contains the basic origin and related rules for purposes of duty-free treatment, was based on section 213(a) of the Caribbean Basin Economic Recovery Act, as amended (19 U.S.C. 2703(a)), which sets forth the origin and related rules governing duty-free treatment under the Caribbean Basin Initiative (CBI). Thus, in order to be eligible for duty-free treatment under the Act, an article imported from a designated beneficiary country must meet three basic requirements: (1) it must be imported directly from a beneficiary country into the customs territory of the United States; (2) it must have its origin in a beneficiary country, that is, it either must be wholly the growth, product, or manufacture of a beneficiary country or must be a new or different article of commerce that has been grown, produced, or manufactured in a beneficiary country; and (3) it must have a minimum domestic value content, that is, at least 35 percent of its appraised value must be attributed to the sum of the cost or value of materials produced in one or more beneficiary countries plus the direct costs of processing operations performed in one or more beneficiary countries. The provisions of section 204(a) of the Act further parallel the provisions of section 213(a) of the CBI statute in the following regards: (1) simple combining or packaging operations or mere dilution with water or another substance does not confer beneficiary country origin on an imported article or on a constituent material of an imported article; (2) the term "beneficiary country" is defined as including the Commonwealth of Puerto Rico and the U.S. Virgin Islands for purposes of determining compliance with the 35 percent value content requirement; (3) the cost or value of materials produced in the customs territory of the United States (other than in Puerto Rico) may be counted toward the 35 percent value content requirement to a maximum of 15 percent of the appraised value of the imported article; and (4) the expression "direct costs of processing operations" is defined in the same manner. However, the origin and related rules of section 204(a) of the Act differ from the corresponding provisions in section 213(a) of the CBI statute in two principal respects: (1) section 204(a) of the Act specifically allows input attributable to one or more CBI beneficiary countries for purposes of the 35 percent value content requirement (the corresponding CBI statutory provision makes no mention of input attributable to beneficiary countries under the Act); and (2) section 204(a) of the Act has no provision corresponding to section 213(a)(4) of the CBI statute which was added to facilitate the addition of value to an article in Puerto Rico and the granting of duty-free treatment after final exportation of an article from a CBI beneficiary country. Section 204(b) of the Act lists eight categories of goods excluded from the duty-free treatment provided for in section 204(a), one of which refers to articles to which reduced rates of duty apply under section 204(c) of the Act. Section 204(c) directs the President to proclaim reductions in the rates of duty on handbags, luggage, flat goods, work gloves and leather wearing apparel that: (1) are the product of any bene-

ficiary country; and (2) were not designated on August 5, 1983, as eligible articles for purposes of the Generalized System of Preferences (GSP) under Title V of the Trade Act of 1974 (19 U.S.C. 2461–2466). These reduced duty rates, which were generally implemented in equal annual stages over a 5-year period (commencing in 1992 and ending in 1996), appear in the HTSUS in the "Special" rate of duty subcolumn followed by the symbol "J" within parentheses.

The U.S. Customs Service is responsible for the administration of laws and regulations regarding the entry of merchandise into the United States. Moreover, section 204(a)(2) of the Act specifically directs the Secretary of the Treasury to promulgate such regulations as may be necessary to carry out the duty-free treatment provisions of the Act. Accordingly, this document proposes to amend the Customs Regulations to implement the duty preference provisions of the Act.

In view of the similarity between the origin and related rules under the Act and those under the CBI, the proposed regulations set forth in this document are based in significant part on the CBI regulations contained in §§ 10.191–10.198 of the Customs Regulations (19 CFR 10.191–10.198). However, some variations have been made from the CBI approach, in some cases to reflect differences between the Act and the CBI statute and in other cases to simplify or otherwise improve on the layout of the CBI regulations. The proposed regulations are discussed in detail below.

Discussion of Proposed Amendments

Section 10.201:

This section sets forth a general statement regarding the purpose of the regulations with reference to the Act and its implementation by the President.

Section 10.202:

This section sets forth definitions of terms or expressions of general use throughout the regulatory texts.

Paragraph (a), which defines "beneficiary country", reflects both the definition in section 203(a)(1) of the Act and the approach taken in § 10.191(b)(1) of the CBI regulations. The exception language in the definition is directed to those entities that are treated as beneficiary countries only for the limited purpose of the 35 percent value content requirement (see the discussion of § 10.206(b) below). Thus, where the term "beneficiary country" appears in a regulatory text without any modifier or qualification and the context does not involve the 35 percent value content requirement, such term has reference only to an ATPA beneficiary country as so designated by the President.

The definition of "eligible articles" in paragraph (b) is similar to the approach taken in § 10.191(b)(2) of the CBI regulations. The definition refers specifically to duty-free treatment, which is authorized under section 204(a) of the Act, and thus does not apply to reduced-duty treatment under section 204(c) of the Act (see § 10.208 below). The list of ar-

ticles excluded from the definition reflect the terms of section 204(b) of the Act.

The definition of "entered" in paragraph (c) is taken from section 203(a)(2) of the Act.

The definition of "wholly the growth, product, or manufacture of a beneficiary country" in paragraph (d) simply refers to the definition of the same expression set forth in § 10.191(b)(3) of the CBI regulations.

Section 10.203:

This section makes a general reference to the requirements for preferential duty treatment and with cross-references to the specific sections which set forth those requirements in detail. Although somewhat different from the approach taken in the CBI regulations, Customs believes that this general statement/cross-reference approach will facilitate the reader's overall understanding of the duty-free aspects of the Act and the requirements thereunder.

This section refers only to duty-free treatment (which is provided for under section 204(a) of the Act) and to those sections of the regulations that deal with the requirements for such treatment. Thus, this section and the other sections cited therein have no application in the case of reduced-duty treatment which is provided for separately under section 204(c) of the Act (see the discussion of § 10.208 below).

Section 10.204:

This section implements the "imported directly" requirement of section 204(a)(1)(A) of the Act and is based on § 10.193 of the CBI regulations. As in the case of the CBI, reference is made to shipment from "any" beneficiary country because, under the wording of the statute (and as a means to facilitate cumulation of value among multiple beneficiary countries—see § 10.206 below), the article merely must be imported directly from "a" beneficiary country and thus does not have to be shipped from the beneficiary country where it was produced.

Section 10.205:

This section sets forth the basic country of origin rules which apply to articles for purposes of duty-free treatment under section 204 of the Act.

The "wholly the growth, product, or manufacture" language in paragraph (a)(1) and the "new or different article of commerce which has been grown, produced, or manufactured" language in paragraph (a)(2) reflect standards required by section 204(a)(2) of the Act to be included in the implementing regulations.

Paragraph (b) implements the simple combining or packaging or mere dilution exceptions to duty-free eligibility required to be in the regulations by section 204(a)(2) of the Act. Since the language of the Act in this regard is identical to language used in the CBI statute, this paragraph follows § 10.195(a)(1) of the CBI regulations by including the words "(as opposed to complex or meaningful)" after the word "simple", and the last sentence is intended to shorten the regulatory text by

incorporating by reference the provisions of the CBI regulations which clarify the meaning and application of identical statutory language. It should be noted that, as in the case of the CBI, the simple combining or packaging or mere dilution language operates only in the limited context of eligibility for duty-free treatment; that language does not limit or otherwise affect a determination as to whether a new or different article of commerce has been created in a beneficiary country within the meaning of paragraph (a)(2) of this section.

Section 10.206:

This section implements the 35 percent value content requirement contained in section 204(a)(1)(B) of the Act.

Paragraph (a) sets forth the basic requirement but refers simply to "a beneficiary country or countries" without specifically mentioning CBI beneficiary countries even though such countries are specified in the statutory text with regard to both the cost or value of materials and the direct costs of processing operations (see the discussion of paragraph (b) below). As in the case of the CBI, the statutory and regulatory texts permit unlimited cumulation of value among "beneficiary countries" for purposes of meeting the 35 percent value content requirement.

In paragraph (b), the first sentence defines "beneficiary country" as including, for purposes of the 35 percent value content requirement, (1) the Commonwealth of Puerto Rico and the U.S. Virgin Islands and (2) any CBI beneficiary country. The reference to CBI beneficiary countries in this regulatory context (rather than in paragraph (a) of this section) is intended to simplify the regulatory texts here and elsewhere and will have no substantive effect on the proper interpretation and application of the statutory provisions. The second sentence of this paragraph is based on the second sentence of § 10.195(b) of the CBI regulations and is intended to clarify a basic legal limitation on the statutorially-permitted cumulation of value attributable to entities that are not "beneficiary countries" as defined in section 203(a)(1) of the Act: except in the case of Puerto Rico which is part of the customs territory of the United States, if value is added to an article in any such entity (that is, in the U.S. Virgin Islands or in a CBI beneficiary country) after final exportation of the article from a beneficiary country designated as such by the President under the Act and prior to importation into the United States, such addition of value would disqualify the article from duty-free treatment because the article would have entered the commerce of the intermediate entity and thus could not be considered to be "imported directly" upon arrival in the customs territory of United States within the meaning of section 204(a)(1)(A) of the Act and § 10.204 of the implementing regulations. While the same legal limitation would not apply *per se* in the case of value added in Puerto Rico or in the case of U.S.-produced materials added in the United States (see paragraph (c) of this section), as a practical matter the opportunities for such additions in a post-final-exportation context and prior to entry for consumption are limited by the following factors: (1) bonded manufac-

turing warehouses cannot be used because under 19 U.S.C. 1311 and § 19.15 of the Customs Regulations (19 CFR 19.15) the article subjected to a manufacturing process in such a warehouse may not be withdrawn for consumption but rather must be exported; (2) while a storage and manipulation warehouse under 19 U.S.C. 1557 and 1562 and Part 144 of the Customs Regulations (19 CFR Part 144) could be used, the benefit as regards added value would not be significant in most cases because manufacturing processes are precluded in such warehouses; (3) while foreign-trade zones established and operated under 19 U.S.C. 81a–81u and Part 146 of the Customs Regulations (19 CFR Part 146) could be used, such facilities involve special procedures and limitations; and (4) while an article could be imported under a temporary importation bond for processing (including manufacture) under subheading 9813.00.05, HTSUS, and § 10.31 of the Customs Regulations (19 CFR 10.31), such an article ultimately would have to be exported in accordance with the terms of the bond. It is also noted in this regard that the Act contains no provision similar to section 213(a)(4) of the CBI statute (19 U.S.C. 2703(a)(4)) which was added in 1984 specifically for the purpose of facilitating the addition of value through tail-end processing performed in bonded manufacturing warehouses located in Puerto Rico.

Paragraph (c) reflects section 204(a)(1) as regards the inclusion of U.S.-produced materials and is based on § 10.195(c) of the CBI regulations.

Paragraph (d) is based on § 10.196 of the CBI regulations. The following points are noted as regards this paragraph:

1. Subparagraph (1) corresponds to paragraph (a) of the CBI regulation but with the following principal differences: (1) the simple combining or packaging or mere dilution limitation (also applicable to materials under section 204(a)(2) of the Act) has been included directly, rather than as a cross-reference to the rule set forth in the regulatory provision covering articles (§ 10.205(b)), for purposes of clarity and in order to ensure that a clear distinction is made between application of the rule for purposes of eligibility of an article for duty-free treatment and application of the rule for purposes of determining the origin of a material for purposes of the 35 percent value content requirement; and (2) to avoid unnecessary repetition of regulatory text, the examples of § 10.196(a), and the principles and examples of § 10.195(a)(2), of the CBI regulations have been incorporated by reference since those CBI provisions are equally applicable in the present context.

2. Subparagraph (2) is taken from § 10.196(b) of the CBI regulations.

3. Subparagraph (3) follows § 10.196(c) of the CBI regulations but also refers specifically to materials produced in the customs territory of the United States.

Paragraph (e) implements section 204(a)(3) of the Act (which is identical to section 213(a)(3) of the CBI statute (19 U.S.C. 2703(a)(3)) and follows the terms of § 10.197 of the CBI regulations.

Paragraph (f) is based on, and is used in the same context as, § 10.195(e) of the CBI regulations. Wherever origin terminology and the term "beneficiary country" are used together with reference to an article, the latter term is restricted so as to cover only a beneficiary country designated under the Act by the President, in order to reflect the fact that an article (as opposed to materials incorporated in an article) must be a product of such a beneficiary country and cannot be a product of a CBI beneficiary country.

Section 207:

This section is intended to cover all procedural requirements, including the submission of documentation required to support a claim for duty-free treatment. The provisions of this section are based on CBI regulatory provisions.

Paragraph (a), which concerns the procedure for filing a claim for duty-free treatment, is based on § 10.192 of the CBI regulations but does not include the first sentence of the CBI provision which Customs believes is redundant and thus unnecessary. The exception language at the beginning of the paragraph is intended to reflect the fact that this procedure does not apply in the case of an informal entry.

Paragraph (b) concerns the documentary evidence of country of origin and of compliance with the 35 percent value content requirement and, subject to changes to reflect the context of the Act, follows the terms of § 10.198(a) of the CBI regulations.

Paragraph (c) sets forth the procedures which apply in the case of informal entries and is based on § 10.198(b) of the CBI regulations.

Paragraph (d), which concerns evidence of direct importation, is based on § 10.194 of the CBI regulations. However, the last sentence of paragraph (a) of the CBI provision has not been included because it is covered by paragraph (e) of this section.

Paragraph (e), which concerns verification of submitted documentation, is based on § 10.198(c) of the CBI regulations but refers to all documentation submitted under § 10.207, that is, evidence of country of origin and of compliance with the 35 percent value content requirement submitted under paragraph (b) and evidence of direct importation submitted under paragraph (d).

Section 10.208:

This section implements the duty-reduction provisions of section 204(c) of the Act. This section is set forth separately to reflect the fact that the Act treats the duty-reduction provisions separately from the duty-free provisions of section 204(a) and without any repetition of, or cross-reference to, the legal requirements that apply for purposes of duty-free treatment. Thus, paragraph (a) of this section does not refer to direct importation, the 35 percent value content requirement, or the simple combining or packaging or mere dilution limitation because, under the terms of the Act, those legal standards apply only for purposes of duty-free treatment under section 204(a), and no ATPA Declaration is required under this section because the ATPA Declaration is

directed primarily to compliance with the 35 percent value content requirement. However, because Customs believes that the words "product of" as used in section 204(c)(1)(A) of the Act should be interpreted as synonymous with the basic origin rule used for Customs purposes, paragraph (a) of this section repeats the rule set forth in § 10.205(a) as discussed above. Paragraph (b), which sets forth the normal procedure for filing a reduced-duty claim, and paragraph (c), which covers verification of a reduced-duty claim, are variations of §§ 10.207(a) and (e) and are otherwise self-explanatory.

COMMENTS

Before adopting the proposed amendments as a final rule, consideration will be given to any written comments (preferably in triplicate) timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Anenue, N.W., 3rd Floor, Washington, D.C.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. The amendments reflect statutory requirements that are already in effect and follow existing regulatory provisions that implement similar statutory programs. Accordingly, the proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

PAPERWORK REDUCTION ACT

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collection of information in these proposed regulations is in § 10.207. This information conforms to requirements in 19 U.S.C. 3203(a) and is used by Customs to determine whether goods imported from designated beneficiary countries are entitled to duty-free entry under that statutory provision. The likely respondents are business organizations including importers, exporters, and manufacturers.

Estimated total annual reporting and/or recordkeeping burden: 5,000 hours.

Estimated average annual burden per respondent/recordkeeper: 2 minutes.

Estimated number of respondents and/or recordkeepers: 150,000.

Estimated annual number of responses: 150,000.

Comments on the collection of information should be sent to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503. A copy should also be sent to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments should be submitted within the time frame that comments are due regarding the substance of the proposal.

Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or startup costs and costs of operations, maintenance, and purchase of services to provide information.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 10

Andean trade preference, Customs duties and inspection, Entry procedures, Imports.

PROPOSED AMENDMENTS TO THE REGULATIONS

For the reasons set forth above, it is proposed to amend Part 10, Customs Regulations (19 CFR Part 10), as set forth below.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for Part 10 continues to read, and a specific authority citation for §§ 10.201 through 10.207 is added to read, as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314;

* * * * * * *

§§ 10.201 through 10.207 also issued under 19 U.S.C. 3203.

2. Part 10 is amended by adding a new center heading followed by new sections 10.201 through 10.208 to read as follows:

ANDEAN TRADE PREFERENCE

Sec.

ANDEAN TRADE PREFERENCE

§ 10.201 Applicability.

Title II of Public Law 102–182 (105 Stat. 1233), entitled the Andean Trade Preference Act (ATPA) and codified at 19 U.S.C. 3201–3206, authorizes the President to proclaim duty-free treatment for all eligible articles from any beneficiary country, to designate countries as beneficiary countries, and to proclaim duty reductions for certain goods not eligible for duty-free treatment. The provisions of §§ 10.202–10.208 of this part set forth the legal requirements and procedures that apply for purposes of obtaining such duty-free or reduced-duty treatment for articles from a beneficiary country which are identified for purposes of such treatment in General Note 11, Harmonized Tariff Schedule of the United States (HTSUS), and in the "Special" rate of duty column of the HTSUS.

§ 10.202 Definitions.

The following definitions apply for purposes of §§ 10.201 through 10.208:

(a) *Beneficiary country.* Except as otherwise provided in § 10.206(b), the term "beneficiary country" refers to any country or successor political entity with respect to which there is in effect a proclamation by the President designating such country or successor political entity as a beneficiary country in accordance with section 203 of the ATPA (19 U.S.C. 3202).

(b) *Eligible articles.* The term "eligible" when used with reference to an article means any merchandise which is imported directly from a beneficiary country as provided in § 10.204, which meets the country of origin criteria set forth in § 10.205 and the value-content requirement set forth in § 10.206, and which, if the requirements of § 10.207 are met, is therefore entitled to duty-free treatment under the ATPA. The following merchandise shall not be considered eligible articles entitled to duty-free treatment under the ATPA:

(1) Textile and apparel articles which are subject to textile agreements;

(2) Footwear not designated on December 4, 1991, as eligible for the purpose of the Generalized System of Preferences under Title V, Trade Act of 1974, as amended (19 U.S.C. 2461–2466);

(3) Tuna, prepared or preserved in any manner, in airtight containers;

(4) Petroleum, or any product derived from petroleum, provided for in headings 2709 and 2710, Harmonized Tariff Schedule of the United States (HTSUS);

(5) Watches and watch parts (including cases, bracelets, and straps), of whatever type including, but not limited to, mechanical, quartz digital or quartz analog, if such watches or watch parts contain any material which is the product of any country with respect to which HTSUS column 2 rates of duty apply;

(6) Sugars, syrups, and molasses classified in subheadings 1701.11.03, 1701.12.02, 1701.99.02, 1702.90.32, 1806.10.42, and 2106.90.12, HTSUS;

(7) Rum and tafia classified in subheading 2208.40.00, HTSUS; or

(8) Articles to which reduced rates of duty apply under section 204(c) of the ATPA (19 U.S.C. 3203(c)) (see § 10.208).

(c) *Entered.* The term "entered" means entered, or withdrawn from warehouse for consumption, in the customs territory of the United States.

(d) *Wholly the growth, product, or manufacture of a beneficiary country.* The expression "wholly the growth, product, or manufacture of a beneficiary country" has the same meaning as that set forth in § 10.191(b)(3) of this part.

§ 10.203 Eligibility criteria in general.

An article classifiable under a subheading of the Harmonized Tariff Schedule of the United States for which a rate of duty of "Free" appears in the "Special" subcolumn followed by the symbol "J" or "J*" in parentheses is eligible for duty-free treatment, and will be accorded such treatment, if each of the following requirements is met:

(a) *Imported directly.* The article is imported directly from a beneficiary country as provided in § 10.204.

(b) *Country of origin criteria.* The article complies with the country of origin criteria set forth in § 10.205.

(c) *Value content requirement.* The article complies with the value content requirement set forth in § 10.206.

(d) *Filing of claim and submission of supporting documentation.* The claim for duty-free treatment is filed, and any required documentation in support of the claim is submitted, in accordance with the procedures set forth in § 10.207.

§ 10.204 Imported directly.

In order to be eligible for duty-free treatment under the ATPA, an article shall be imported directly from a beneficiary country into the customs territory of the United States. For purposes of this requirement, the words "imported directly" mean:

(a) Direct shipment from any beneficiary country to the United States without passing through the territory of any non-beneficiary country; or

(b) If shipment from any beneficiary country to the United States was through the territory of a non-beneficiary country, the articles in the shipment did not enter into the commerce of the non-beneficiary country while en route to the United States, and the invoices, bills of lading, and other shipping documents show the United States as the final destination; or

(c) If shipment from any beneficiary country to the United States was through the territory of a non-beneficiary country and the invoices and other documents do not show the United States as the final destination, then the articles in the shipment, upon arrival in the United States, are imported directly only if they:

(1) Remained under the control of the customs authority in the intermediate country;

(2) Did not enter into the commerce of the intermediate country except for the purpose of sale other than at retail, and the articles are imported into the United States as a result of the original commercial transaction between the importer and the producer or the latter's sales agent; and

(3) Were not subjected to operations in the intermediate country other than loading and unloading, and other activities necessary to preserve the articles in good condition.

§ 10.205 Country of origin criteria.

(a) *General.* Except as otherwise provided in paragraph (b) of this section, an article may be eligible for duty-free treatment under the ATPA if the article is either:

(1) Wholly the growth, product, or manufacture of a beneficiary country; or

(2) A new or different article of commerce which has been grown, produced, or manufactured in a beneficiary country.

(b) *Exceptions.* No article shall be eligible for duty-free treatment under the ATPA by virtue of having merely undergone simple (as opposed to complex or meaningful) combining or packaging operations, or mere dilution with water or mere dilution with another substance that does not materially alter the characteristics of the article. The principles and examples set forth in § 10.195(a)(2) of this part shall apply equally for purposes of this paragraph.

§ 10.206 Value content requirement.

(a) *General.* An article may be eligible for duty-free treatment under the ATPA only if the sum of the cost or value of the materials produced in a beneficiary country or countries, plus the direct costs of processing operations performed in a beneficiary country or countries, is not less than 35 percent of the appraised value of the article at the time it is entered.

(b) *Commonwealth of Puerto Rico, U.S. Virgin Islands and CBI beneficiary countries.* For purposes of determining the percentage referred to in paragraph (a) of this section, the term "beneficiary country" includes the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and any CBI beneficiary country as defined in § 10.191(b)(1) of this part. Any cost or value of materials or direct costs of processing operations attributable to the Virgin Islands or any CBI beneficiary country must be included in the article prior to its final exportation to the United States from a beneficiary country as defined in § 10.202(a).

(c) *Materials produced in the United States.* For purposes of determining the percentage referred to in paragraph (a) of this section, an amount not to exceed 15 percent of the appraised value of the article at the time it is entered may be attributed to the cost or value of materials produced in the customs territory of the United States (other than the Commonwealth of Puerto Rico). The principles set forth in paragraph (d)(1) of this section shall apply in determining whether a material is "produced in the customs territory of the United States" for purposes of this paragraph.

(d) *Cost or value of materials.*

(1) *"Materials produced in a beneficiary country or countries" defined.* For purposes of paragraph (a) of this section, the words "materials produced in a beneficiary country or countries" refer to those materials incorporated in an article which are either:

(i) Wholly the growth, product, or manufacture of a beneficiary country or two or more beneficiary countries; or

(ii) Substantially transformed in any beneficiary country or two or more beneficiary countries into a new or different article of commerce which is then used in any beneficiary country as defined in § 10.202(a) in the production or manufacture of a new or different article which is imported directly into the United States. For purposes of this paragraph (d)(1)(ii), no material shall be considered to be substantially transformed into a new or different article of commerce by virtue of having merely undergone simple (as opposed to complex or meaningful) combining or packaging operations, or mere dilution with water or mere dilution with another substance that does not materially alter the characteristics of the article. The examples set forth in § 10.196(a) of this part, and the principles and examples set forth in § 10.195(a)(2) of this part, shall apply for purposes of the corresponding context under paragraph (d)(1) of this section.

(2) *Questionable origin.* When the origin of a material either is not ascertainable or is not satisfactorily demonstrated to the appropriate port director, the material shall not be considered to have been grown, produced, or manufactured in a beneficiary country or in the customs territory of the United States.

(3) *Determination of cost or value of materials.*

(i) The cost or value of materials produced in a beneficiary country or countries or in the customs territory of the United States includes:

(A) The manufacturer's actual cost for the materials;

(B) When not included in the manufacturer's actual cost for the materials, the freight, insurance, packing, and all other costs incurred in transporting the materials to the manufacturer's plant;

(C) The actual cost of waste or spoilage, less the value of recoverable scrap; and

(D) Taxes and/or duties imposed on the materials by any beneficiary country or by the United States, provided they are not remitted upon exportation.

(ii) Where a material is provided to the manufacturer without charge, or at less than fair market value, its cost or value shall be determined by computing the sum of:

(A) All expenses incurred in the growth, production, or manufacture of the material, including general expenses;

(B) An amount for profit; and

(C) Freight, insurance, packing, and all other costs incurred in transporting the material to the manufacturer's plant.

(iii) If the pertinent information needed to compute the cost or value of a material is not available, the appraising officer may ascertain or estimate the value thereof using all reasonable ways and means at his disposal.

(e) *Direct costs of processing operations.*

(1) *Items included.* For purposes of paragraph (a) of this section, the words "direct costs of processing operations" mean those costs either directly incurred in, or which can be reasonably allocated to, the growth, production, manufacture, or assembly of the specific merchandise under consideration. Such costs include, but are not limited to the following, to the extent that they are includable in the appraised value of the imported merchandise:

(i) All actual labor costs involved in the growth, production, manufacture, or assembly of the specific merchandise, including fringe benefits, on-the-job training, and the cost of engineering, supervisory, quality control, and similar personnel;

(ii) Dies, molds, tooling, and depreciation on machinery and equipment which are allocable to the specific merchandise;

(iii) Research, development, design, engineering, and blueprint costs insofar as they are allocable to the specific merchandise; and

(iv) Costs of inspecting and testing the specific merchandise.

(2) *Items not included.* For purposes of paragraph (a) of this section, the words "direct costs of processing operations" do not include items which are not directly attributable to the merchandise under consideration or are not costs of manufacturing the product. These include, but are not limited to:

(i) Profit; and

(ii) General expenses of doing business which either are not allocable to the specific merchandise or are not related to the growth, production, manufacture, or assembly of the merchandise, such as administrative

salaries, casualty and liability insurance, advertising, and salesmen's salaries, commissions, or expenses.

(f) *Articles wholly the growth, product, or manufacture of a beneficiary country.* Any article which is wholly the growth, product, or manufacture of a beneficiary country as defined in § 10.202(a), and any article produced or manufactured in a beneficiary country as defined in § 10.202(a) exclusively from materials which are wholly the growth, product, or manufacture of a beneficiary country or countries, shall normally be presumed to meet the requirement set forth in paragraph (a) of this section.

§ 10.207 Procedures for filing duty-free treatment claim and submitting supporting documentation.

(a) *Filing claim for duty-free treatment.* Except as provided in paragraph (c) of this section, a claim for duty-free treatment under the ATPA may be made at the time of filing the entry summary by placing the symbol "J" as a prefix to the Harmonized Tariff Schedule of the United States subheading number applicable to each article for which duty-free treatment is claimed on that document.

(b) *Shipments covered by a formal entry.*

(1) *Articles not wholly the growth, product, or manufacture of a beneficiary country.*

(i) *Declaration.* In a case involving an article covered by a formal entry for which duty-free treatment is claimed under the ATPA and which is not wholly the growth, product, or manufacture of a single beneficiary country as defined in § 10.202(a), the exporter or other appropriate party having knowledge of the relevant facts in the beneficiary country as defined in § 10.202(a) where the article was produced or last processed shall be prepared to submit directly to the port director, upon request, a declaration setting forth all pertinent detailed information concerning the production or manufacture of the article. When requested by the port director, the declaration shall be prepared in substantially the following form:

ATPA DECLARATION

I, _____ (name), hereby declare that the articles described below (a) were produced or manufactured in _____ (country) by means of processing operations performed in that country as set forth below and were also subjected to processing operations in the other beneficiary country or countries (including the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and any CBI beneficiary country) as set forth below and (b) incorporate materials produced in the country named above or in any other beneficiary country or countries (including the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and any CBI beneficiary country) or in the customs territory of the United States (other than the Commonwealth of Puerto Rico) as set forth below:

Number and date of invoices	Description of articles and quantity	Processing operations performed on articles		Material produced in a beneficiary country or in the U.S.	
		Description of processing operations and country of processing	Direct costs of processing operations	Description of material, production process, and country of production	Cost or value of material

Date _____

Address _____

Signature _____

Title _____

(ii) *Retention of records and submission of declaration.* The information necessary for the preparation of the declaration shall be retained in the files of the party responsible for its preparation and submission for a period of 5 years. In the event that the port director requests submission of the declaration during the 5-year period, it shall be submitted by the appropriate party directly to the port director within 60 days of the date of the request or such additional period as the port director may allow for good cause shown. Failure to submit the declaration in a timely fashion will result in a denial of duty-free treatment.

(iii) *Value added after final exportation.* In a case in which value is added to an article in the Commonwealth of Puerto Rico or in the United States after final exportation of the article from a beneficiary country as defined in § 10.202(a), in order to ensure compliance with the value requirement under § 10.206(a), the declaration provided for in paragraph (b)(1)(i) of this section shall be filed by the importer or consignee with the entry summary. The declaration shall be completed by the party responsible for the addition of such value.

(2) *Articles wholly the growth, product, or manufacture of a beneficiary country.* In a case involving an article covered by a formal entry for which duty-free treatment is claimed under the ATPA and which is wholly the growth, product, or manufacture of a single beneficiary country as defined in § 10.202(a), a statement to that effect shall be included on the commercial invoice provided to Customs.

(c) *Shipments covered by an informal entry.* The normal procedure for filing a claim for duty-free treatment as set forth in paragraph (a) of this section need not be followed, and the filing of the declaration provided for in paragraph (b)(1)(i) of this section will not be required, in a case involving a shipment covered by an informal entry. However, the port

director may require submission of such other evidence of entitlement to duty-free treatment as deemed necessary.

(d) *Evidence of direct importation.*

(1) *Submission.* The port director may require that appropriate shipping papers, invoices, or other documents be submitted within 60 days of the date of entry as evidence that the articles were "imported directly", as that term is defined in § 10.204.

(2) *Waiver.* The port director may waive the submission of evidence of direct importation when otherwise satisfied, taking into consideration the kind and value of the merchandise, that the merchandise was, in fact, imported directly and that it otherwise clearly qualifies for duty-free treatment under the ATPA.

(e) *Verification of documentation.* The documentation submitted under this section to demonstrate compliance with the requirements for duty-free treatment under the ATPA shall be subject to such verification as the port director deems necessary. In the event that the port director is prevented from obtaining the necessary verification, the port director may treat the entry as fully dutiable.

§ 10.208 Duty reductions for certain products.

(a) *General.* Handbags, luggage, flat goods, work gloves, and leather wearing apparel that were not designated on August 5, 1983, as eligible articles for purposes of the Generalized System of Preferences under Title V, Trade Act of 1974, as amended (19 U.S.C. 2461–2466), are not eligible for duty-free treatment under the ATPA. However, any such article from a beneficiary country may be subject to a reduced rate of duty set forth in the Harmonized Tariff Schedule of the United States in the applicable "Special" subcolumn followed by the symbol "J" in parenthesis, provided the article is a product of any beneficiary country. For purposes of this section, an article is a "product of" a beneficiary country if the article is either:

(1) Wholly the growth, product, or manufacture of a beneficiary country; or

(2) A new or different article of commerce which has been grown, produced, or manufactured in a beneficiary country.

(b) *Filing reduced-duty claim.* A claim for reduced-duty treatment under the ATPA may be made at the time of filing the entry summary or other entry document by placing thereon the symbol "J" as a prefix to the Harmonized Tariff Schedule of the United States subheading number applicable to each article for which reduced-duty treatment is claimed and by placing thereon the reduced duty rate applicable to each such article.

(c) *Verification of reduced-duty claim.* Any claim for reduced-duty treatment under this section shall be subject to such verification as the port director deems necessary. In the event that the port director is pre-

vented from obtaining the necessary verification, the port director may treat the entry as dutiable at the applicable non-ATPA rate.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: December 24, 1997.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, January 30, 1998 (63 FR 4601)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 98–4)

FABRIQUE DE FER DE CHARLEROI S.A., PLAINTIFF *v.* UNITED STATES OF AMERICA AND THE U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND GENEVA STEEL ET AL., INTERVENOR-DEFENDANTS

Court No. 93–09–00600–AD

[Plaintiff's motion for judgment on agency record granted.]

(Decided January 16, 1998)

Barnes, Richardson & Colburn (Gunter von Conrad and *Peter A. Martin)* for the plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, and *Velta A. Melnbrencis,* Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce *(Elizabeth C. Seastrum),* of counsel, for the defendants.

Dewey Ballantine (Alan Wm. Wolff and *Michael H. Stein)* and *Skadden, Arps, Slate, Meagher & Flom (Robert E. Lighthizer* and *John J. Mangan)* for the intervenor-defendants.

OPINION AND ORDER

AQUILINO, *Judge:* The above-named plaintiff ("Fafer" or "FFC") initially pleaded six causes of action herein, essentially that the International Trade Administration, U.S. Department of Commerce ("ITA") (i) unlawfully amended its final determination of sales of certain cut-to-length carbon steel plate from Belgium at less than fair value[1] based on an erroneous recalculation of Fafer's profit data, (ii) unlawfully rejected the model-match selection originally submitted by the company, (iii) unlawfully rejected FFC's clarification of the difference in merchandise adjustment information, (iv) incorrectly included the company's current yearly increase in its pre-pension provision in G&A expense for cost-of-production and constructed-value calculations, (v) unlawfully committed various additional substantive errors in its use of constructed value, cost of production and price-to-price sales, and

[1] *See* 58 Fed.Reg. 37,083 (July 9, 1993).

(vi) unlawfully committed various additional computational and programming errors in its calculation of the weighted-average antidumping-duty margin assigned to Fafer. *See* Complaint, paras. 5–10.

I

Subsequent to this pleading, counsel for the plaintiff were invited to present a motion for judgment on the agency record within the meaning of CIT Rule 56.2. And they have done so, albeit focusing only on the first alleged cause of action.[2] To quote from plaintiff's statement pursuant to Rule 56.2(c), the ITA

> unlawfully amended its final determination based on an erroneous recalculation of Fafer's profit data. Evidence of record establishes that the profit experience of Fafer calculated on a weighted average basis is substantially lower than that derived by the [ITA]. This incorrect calculation * * * substantially increased the margin percentage applied to Fafer in the *[Antidumping Duty Order and] Amendment to Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From Belgium*, 58 Fed.Reg. 44,164 (August 19, 1993).

That increase was from 3.65 to 13.31. As explained in that amendment and now by the defendants, the petitioners before the agency alleged that it had

> failed to use all of Fafer's reported profit data in the constructed value calculation for the class or kind of merchandise. The profit data allegedly not used was that for Fafer's "Z-type products," which had profit margins exceeding the eight percent statutory minimum. * * *
>
> "Z-type" steel refers to steel which has gone through special testing and for which the manufacturer supplies a certification guaranteeing the product's "through thickness", or Z-axis, characteristics. * * * During the investigation, Fafer contended that its U.S. sales of plate products were not of the Z-type, because they had not undergone the requisite testing and certification and, therefore, should not be compared to Fafer's home market sales of Z-type merchandise. * * * Petitioners contended the opposite. * * * Commerce agreed with Fafer. * * * Fafer did not then and does not now dispute that its Z-type products belong to the class or kind of merchandise covered by the investigation. * * *
>
> During the investigation, Commerce requested Fafer to supply average profit realized on home market sales *of the class or kind of merchandise*. * * * Fafer failed to provide this information. Instead, initially, it provided cost of production information, from which profit data could be calculated for a limited number of home market sales and products, excluding the Z-type products. * * * Subsequently, Commerce requested, and Fafer supplied, cost of production information from which profit data could be calculated for Fafer's home market sales of the Z-type merchandise. * * *

[2] There being no indication to the contrary, the court deems this approach to be an abandonment of any claim to relief on any of the other grounds initially pleaded.

> When Commerce recalculated Fafer's profit for its home market sales, including profit for the Z-type products, the result was a profit greater than the statutory minimum. Commerce then used the recalculated profit figure in recalculating constructed value. As a result, Fafer's estimated antidumping duty rate on plate increased substantially. * * *

Defendants' Memorandum, pp. 3–4 (citations omitted; underscoring in original). Counsel for the intervenors claim, among other things, that the ITA calculated profit using all of the products for which Fafer reported data[3] and that

> its proportional weighting of reported profit on Z-type products and non-Z-type products was proper given the record that Fafer itself created.

Defendant-Intervenors' Memorandum, p. 10 (footnote omitted).

The plaintiff responds that the agency unlawfully used the sampling of Z-type profit to account for a much greater percentage of home-market sales than the record reflects for that particular product; that the ITA unlawfully failed to base profit upon sales of comparable merchandise to the United States; and that it committed reversible error by disguising an unlawful amendment to its final determination as a correction of ministerial error. *See* Plaintiff's Reply *passim*.

II

The court's jurisdiction is pursuant to 28 U.S.C. §§ 1581(c), 2631(c), and its standard for review of the contested agency determination(s) is whether they are unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B); 28 U.S.C. § 2640(b).

A

Congress has adopted short periods of time within which the ITA must carry out its responsibilities, including issuance of final determinations under 19 U.S.C. § 1673d(a). Subsection (e) of that section 1673d provides that the ITA

> establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued under this section. Such procedures shall ensure opportunity for interested parties to present their views regarding any such errors. As used in this subsection, the term "ministerial error" includes errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the [ITA] considers ministerial.

And the agency has established such procedures pursuant to this mandate[4], including a definition of ministerial error essentially *in haec verba* the statute.

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[3] *See* Defendant-Intervenors' Memorandum, p. 7.

[4] *See* 19 C.F.R. §353.28 (1993). This regulation provides for disclosure of and comment on ITA "calculations performed in connection with a final antidumping duty determination", which the record shows occurred in this matter.

As indicated, the plaintiff claims a "substantive methodological change under the guise of a clerical error correction"[5] not contemplated by this statutory section, arguing that its last clause is

> limited to errors of the same general nature or kind as those connoted by the word "errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like."

Plaintiff's Reply, p. 26. Of course, that clause covers "any other type of unintentional error" which the ITA "considers ministerial", but, even if plaintiff's position that this language "should not be read as a grant of unbridled discretion for Commerce to determine when an act is ministerial in nature"[6] is well-taken[7], the court is not persuaded that the agency's approach was anything more than arithmetic. That is, from the beginning the methodology for which the ITA opted was to use constructed value for the foreign market, including profit, as prescribed by 19 U.S.C. §§ 1677b(a)(2) and (e). *Compare Notice of Preliminary Determinations of Sales at Less Than Fair Value and Postponement of Final Determinations: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate From Belgium*, 58 Fed.Reg. 7,075, 7,076 (Feb. 4, 1993), *with Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate From Belgium*, 58 Fed.Reg. 37,083, 37,084 (July 9, 1993). That approach did not change, only the profit calculation in regard thereto. And this court is unable to conclude that this kind of amendment, which admittedly can and did have material impact, is therefore violative of the ITA's authority under section 1673d(e), *supra*.

B

The record reflects Fafer sales of Z-type product in its home market but not in the United States during the period of agency investigation. Whereupon the plaintiff argues that

> basing profit upon sales of comparable merchandise to the United States by the individual producer under investigation remains the only authoritative method of deriving profit for purposes of the constructed value methodology.

Plaintiff's Reply, pp. 23–24, citing *Certain Electric Motors from Japan; Final Determination of Sales of Large Motors at Less Than Fair Value and Suspension of Investigation for Small Motors*, 45 Fed.Reg. 73,723 (Nov. 6, 1980). It claims to have been "compelled" to make this argument by defendants' contention herein that it agrees with ITA inter-

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[5] Plaintiff's Reply, pp. 24–25.

[6] *Id.* at 26.

[7] But compare Webster's Third New International Dictionary of the English Language Unabridged (1993), which defines ministerial at page 1439 to mean, among other things, "of, being, or having the characteristics of an act or duty belonging to the administration of the executive function in government and specifically prescribed by law as part of the official duties of an office".

pretation of the governing statute as requiring inclusion of profit realized on sales of the entire class or kind of home-market merchandise in constructing value, not just profit realized on the type of goods actually exported to the United States. *Compare id.* at 20 *with* Defendants' Memorandum, p. 8.

Whether the plaintiff really agrees with this contention or not[8], it does admit that, in

> the case at hand, both non Z-type and Z-type product comprise merchandise which is of the same general class or kind as the merchandise under consideration.

Plaintiff's Brief, p. 15. And the governing statute, 19 U.S.C §1677b(e)(1) (1993), provided that constructed value include

> * * * (**B**) an amount for * * * profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual commercial quantities and in the ordinary course of trade, except that * * *
>
> (**ii**) the amount for profit shall not be less than 8 percent of the sum of * * * general expenses and cost; * * *.

See also 19 C.F.R. § 353.50(a)(2) (1993). Given the foregoing admission and language of the statute (and regulation based thereon), the plaintiff has little ground to argue that the focus of the ITA when considering profit should only have been on the merchandise it exported from the home market. That is, the court concludes that the agency's focus on profit on sales of the merchandise in the country of exportation is supported by substantial evidence and otherwise in accordance with law.

C

Plaintiff's more pressing point is that that focus unlawfully skewed home-market profit and thus the margin of dumping in the United States. Its position has two alternative prongs, the first being that the ITA reject

> any profit on home market sales of Z-type product and include in its profit calculation only sales of non Z-type product since non Z-type product sales comprise nearly * * * [all] home market sales[,[9]]

or second, the

> only other way to reach a fair and reasonable result in this instance is to read 19 U.S.C. §1677b(e)(1)(B) as requiring that Commerce utilize a *proportional allocation of profit* that reflects the actual sales volume reported in the home market.

Plaintiff's Brief, p. 15 (emphasis in original).

As a respondent in the administrative proceedings, Fafer was called upon by the agency to report the "average profit realized on home mar-

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[8] *Cf.* Plaintiff's Reply, p. 20 ("Fafer's principal brief * * * expressed neither agreement[] nor disagreement about whether this practice is lawful or appropriate").

[9] Plaintiff's Brief, p. 15.

ket/third country sales of the class or kind of merchandise."[10] While the company ultimately responded with regard to Z-type, as well as non-Z-type, product in its home market, the "sales information submitted to Commerce for constructed value purposes was merely a sampling of overall home market sales". Plaintiff's Brief, p. 9. *See also* Plaintiff's Reply, pp. 6–13. The record supports this representation, as well as the representation that Z-type sales in the home market were but a fraction of sales of the other kind of product. However, it does not necessarily follow, as the plaintiff argues, that the relatively few or small Z-type sales were not "in the usual commercial quantities or in the ordinary course of trade" within the meaning of section 1677b(e)(1), *supra*. Indeed, the record which Fafer helped create does not support this thesis. And the court notes in passing that the plaintiff also has not established the existence of any price-quantity correlation so as to bring the statutory definition of "usual commercial quantities"[11] into question. That different products may be sold at different prices does not necessarily establish that the latter are the result of quantity differences. In sum, the court is not persuaded that derivation of profit from all of the products within the class or kind of Fafer's merchandise was not in accordance with law.

With regard to plaintiff's plea for a proportional allocation of profit, at the time of Fafer's home-market sales, the ITA had authority to construct value by selecting

> appropriate samples and averages * * *; but such samples and averages shall be representative of the transactions under investigation.[12]

In *Nachi-Fujikoshi Corp. v. United States*, 19 CIT 914, 918, 890 F.Supp. 1106, 1109 (1995), the court reaffirmed that, while the agency had discretion to resort to sampling under the conditions specified in 19 U.S.C. §1677f–1(a), such sampling could "not be utilized in a manner which produces unrepresentative results." In determining whether the ITA has abused its discretion in its sampling methodology, a court must take into account the precise circumstances of each case. *NTN Bearing Corp. of America v. United States*, 997 F.2d 1453, 1458 (Fed.Cir. 1993). Those at bar do not reflect direct agency resort to "generally recognized sampling techniques" within the meaning of 19 U.S.C. §1677f–1(a) (1993). Rather, respondent Fafer submitted the samples of its home-market business, but the ITA was not at liberty to blindly accept them. *Cf. INA Walzlager Schaeffler KG v. United States*, 21 CIT ____, ____, 957 F.Supp. 251, 273 (1997). As this and other courts have held, the agency's authority under the Trade Agreements Act of 1979, as amended, is "subject to a rational relationship between data chosen and the matter to which they are to apply." *Manifattura Emmepi S.p.A. v. United States*, 16 CIT 619,

[10] Defendants' Confidential Appendix ("ConfApp"), Exhibit 1 (Record Document 29, p. 15). This request was conditioned upon whether or not the company's profit exceeded the statutory minimum 8 percent.

[11] 19 U.S.C. §1677(17).

[12] 19 U.S.C. §1677f–1(b) (1993). This subsection, which was adopted in the Trade and Tariff Act of 1984, Pub. L. No. 98–573, §620(a), 98 Stat. 2948, 3039, was amended by the Uruguay Round Agreements Act, Pub. L. No. 103–465, §229(a), 108 Stat. 4809, 4889 (1994).

624, 799 F.Supp. 110, 115 (1992). *See, e.g., D & L Supply Co. v. United States*, 113 F.3d 1220 (Fed.Cir. 1997); *Sigma Corporation v. United States*, 117 F.3d 1401, 1410–12 (Fed.Cir. 1997). While these cases involved judicial review of ITA enforcement of different sections of the statute, this court is not persuaded that the principle(s) enunciated therein are inapposite to this case where the agency had clear discretion to construct value pursuant to 19 U.S.C. §1677b(e) (1993), but not to such a degree of distortion of the record as presented herein. *Cf. Torrington Company v. United States*, 21 CIT ____, ____, 969 F.Supp. 1332, 1335 (1997).

Hence, this court must confirm plaintiff's complaint that its home-market profit on Z-type product has become extrapolated out of realistic and rational proportion. Perhaps the simple reason for this, as the court has concluded above, is the ministerial nature of the ITA's approach[13], which may well have been all that was permissible, given its timing.

III

Whatever the reason for the distortion contested herein, the court concludes in light of the foregoing that plaintiff's motion for judgment on the agency record must be granted, and the 13.31 weighted-average margin percentage reported for FFC at 58 Fed.Reg. 44,164 must be, and it hereby is, vacated.

The ITA may have 45 days from the date hereof to consider and report whether, in the exercise of its sound discretion, factoring plaintiff's profit on home-market sales of Z-type product in a manner more reflective of the record leads to a weighted-average margin percentage greater than the 3.65 reported at 58 Fed.Reg. 37,091 for FFC. If the court does not receive an affirmative report to this effect by the end of this period, that original margin will be affirmed.

[13] *Cf.* Defendants' ConfApp, Exhibit 4 (Confidential Document 159).

(Slip Op. 98–5)

MARUBENI AMERICA CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–10–00730

(Dated January 20, 1998)

INTERLOCUTORY ORDER

NEWMAN, *Senior Judge:* The subject action is before the court on an order from the United States Court of Appeals for the Federal Circuit ("CAFC") reversing and remanding this court's decisions. *Marubeni America Corporation v. United States* ___ Fed. Cir. ___ C.A. 96–1310 (1997). The CAFC's mandate having been issued on July 14, 1997, it is hereby:

ORDERED that this court's Judgment Orders of October 3, 1995 and January 23, 1996, granting defendant's motion for summary judgment with respect to the classification of the subject merchandise identified as seamless copper tube, or as Thermofin Tube, with or without other words of description, are vacated; and it is further

ORDERED that the classification by the United States Customs Service of the subject merchandise, identified as seamless copper tube, or as Thermofin Tube, with or without other words of description, under subheading 7407.10.10, HTSUS is overruled; and it is further

ORDERED that the United States Customs Service shall reclassify the subject merchandise under subheading 7411.10.10, HTSUS, and shall reliquidate the entries listed on Schedules A and B attached hereto, covering said merchandise, and refund all excess duties; and it is further

ORDERED that the United States Customs Service shall pay interest on the excess duties refunded for the entries listed on Schedule A, pursuant to 19 U.S.C. § 1520(d) (1992) (now repealed), and 28 U.S.C. § 2644; and it is further

ORDERED that the United States Customs Service shall pay interest on the excess duties deposited against those entries listed on Schedule B, pursuant to 28 U.S.C. § 2644 from the filing date of the summons in this action, October 3, 1991, to the date of refund; and it is further

ORDERED that when the decision in *Travenol Laboratories, Inc. v. United States,* ___ F.3d ___, No. 96–1534 (Fed. Cir. July 2, 1997), *reh'g denied,* (Fed. Cir. October 23, 1997) becomes final and the time to seek further judicial review has expired, this Court will entertain any requests from the parties to determine whether the Customs Service should pay interest on the excess duties refunded from the entries listed on Schedule B, pursuant to 19 U.S.C. § 1505(c), as amended by the Customs Modernization Act, effective December 8, 1993.

SCHEDULE "A"

ENTRIES WITH NO INTEREST "ISSUE"

Port: Seattle

Plaintiff	*Protest No.*	*Entry No.*
Marubeni America Corporation	3001–90–100984	221–0725936–2
		221–0727169–8
		221–0727170–6
		221–0727940–2
		221–0727941–0
	3001–90–100985	221–0727969–1
		221–0728442–8
		221–0728640–7
		221–0728642–3
		221–0728776–9
	3001–90–100986	221–0728876–7
		221–0728878–3
		221–0728921–1
		221–0729143–1
		221–0729225–6
	3001–90–100987	221–0729226–4
		221–0729280–1
		221–0729394–0
		221–0729397–3
	3001–90–100991	221–0729395–7
		221–0729398–1
	3001–90–101158	221–0728775–1

SCHEDULE "B"

ENTRIES WHICH MAY REQUIRE PAYMENT OF ADDRNONAL INTEREST

Port: Seattle

Plaintiff	*Protest No.*	*Entry No.*
Marubeni America Corporation	3001–90–100987	221–0729489–8
	3001–90–100988	221–0729490–6
		221–0729491–4
		221–0729671–1
		221–0729673–7
		221–0729674–5
	3001–90–100989	221–0729675–2
		221–0729676–0
		221–0729885–7
		221–0729971–5
		221–0730059–6
	3001–90–100990	221–0730060–4
		221–0730123–0
	3001–90–100991	221–0729777–6
		221–0729778–4
		221–0729820–4
	3001–90–100992	221–0729882–4
		221–0729883–2
		221–0729884–0
		221–0729970–7
		221–0730058–8
	3001–90–101064	221–0729142–3
		221–0730208–9
		221–0730217–0
		221–0730239–4
		221–0730240–2
	3001–90–101156	221–0730373–1
		221–0730420–0
	3001–90–101199	221–0730360–8
		221–0730361–6
		221–0730550–4
		221–0730551–2
		221–0730607–2
	3001–90–101200	221–0730646–0
		221–0730647–8
		221–0730721–1
		221–0730722–9
		221–0730723–7

SCHEDULE "B" (continued)

Plaintiff	*Protest No.*	*Entry No.*
Marubeni America Corporation	3001–90–101227	221–0730826–8
		221–0730838–3
		221–0730839–1
	3001–90–101277	221–0730949–8
		221–0730951–4
		221–0731141–1
		221–0731142–9
		221–0731143–7
	3001–90–101278	221–0730950–6
		221–0731032–2
		221–0731033–0
		221–0731074–4
	3001–90–101415	221–0731144–5
		221–0731180–9
		221–0731283–1
		221–0731284–9
		221–0731285–6
	3001–90–101417	221–0731301–1
	3001–90–101424	221–0731690–7
		221–0731691–5
	3001–90–101425	221–0731523–0
		221–0731605–5
		221–0731606–3
		221–0731607–1
		221–0731608–9
	3001–90–101426	221–0731406–8
		221–0731408–4
		221–0731409–2
		221–0731464–7
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(Slip Op. 98–6)

SNR ROULEMENTS, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND FEDERAL-MOGUL CORP. AND TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 93–08–00489

Plaintiff, SNR Roulements ("SNR"), moves this Court for judgment on the agency record pursuant to Rule 56.2 of the Rules of this Court. SNR challenges the Department of Commerce, International Trade Administration's ("Commerce") final results of the third administrative review, entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order*, 58 Fed. Reg. 39,729 (July 26, 1993) *("Final Results")*. SNR claims Commerce erred in its calculation of U.S. price and foreign market value ("FMV") in the Final Results by deducting direct selling expenses incurred in the United States from U.S. price rather than adding such expenses to FMV.

Held: SNR's motion for judgment on the agency record is denied and this case is dismissed.

[Plaintiff's motion denied; case dismissed.]

(Dated January 23, 1998)

Grunfeld, Desiderio, Lebowitz & Silverman (Bruce M. Mitchell, Jeffrey S. Grimson and *Philip S. Gallas)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Jeffrey M. Telep);* of counsel: *Thomas H. Fine,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, Department of Commerce, for defendant.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel and *Joseph A. Perna, V)* for defendant-intervenor Federal-Mogul Corporation.

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine and *Lane S. Hurewitz)* for defendant-intervenor The Torrington Company.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiff, SNR Roulements ("SNR"), moves this Court for judgment on the agency record pursuant to Rule 56.2 of the Rules of this Court. SNR challenge the Department of Commerce, International Trade Administration's ("Commerce") final results of the third administrative review, entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order*, 58 Fed. Reg. 39,729 (July 26, 1993) *("Final Results")*.

BACKGROUND

The administrative review at issue encompasses imports of antifriction bearings during the review period, May 1, 1991 through April 30, 1992. *See Final Results,* 58 Fed. Reg. at 39,729. On April 27, 1993, Commerce published the preliminary results of the instant review. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 58 Fed. Reg. 25,606. On July 26, 1993, Commerce published the Final Results at issue. *See Final Results,* 58 Fed. Reg. at 39,729.

SNR claims Commerce erred in its calculation of U.S. price and foreign market value ("FMV") by deducting direct selling expenses in-

curred in the United States from U.S. price rather than adding such expenses to FMV.

DISCUSSION

The Court has jurisdiction over this matter under 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

Commerce deducted direct expenses incurred in the United States from U.S. price in exporter's sales price ("ESP") sales pursuant to 19 U.S.C. § 1677a(e)(2) (1988). Section 1677a(e)(2) states that Commerce is to reduce ESP by the amount, if any, of "expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise." Plaintiff argues that Commerce should have added the expenses at issue to FMV. According to SNR, Commerce improperly has continued to apply section 1677a(e)(2) to indirect *and* direct selling expenses although the Court of Appeals for the Federal Circuit ("CAFC") has interpreted that section to refer exclusively to indirect selling expenses. SNR's Mem. Supp. Mot. J. Agency R. at 4–6.

The CAFC determined that Commerce may deduct direct selling expenses incurred in the United States from ESP pursuant to section 1677a(e)(2) just days after SNR filed their motion in this case. *See Koyo Seiko Co. v. United States*, 36 F.3d 1565 (Fed. Cir. 1994). In that case, the CAFC first found that the plain language of section 1677a(e)(2) was not dispositive. The court then concluded that Commerce's treatment of U.S. direct selling expenses was reasonable, as it "evidences an attempt to make mirror-image adjustments to foreign market value and exporter's sales price so that they can be fairly compared at the same point in the chain of commerce." *Koyo Seiko*, 36 F.3d at 1573; *see also NTN Bearing Corp. of Am. v. United States*, 19 CIT ___, ___, 905 F. Supp. 1083, 1088 (1995); *NTN Bearing Corp. of Am. v. United States*, 19 CIT ___, ___, 903 F. Supp. 62, 66 (1995).

CONCLUSION

Commerce's decision to adjust ESP by deducting certain direct selling expenses incurred in the United States is supported by substantial evidence and is, therefore, affirmed. Commerce is sustained as to all other issues.

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